89-568

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL.,
PETITIONERS

v.

STANLEY SMOLAREK AND RALPH FLEMING,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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90 pp

QUESTION PRESENTED

Whether Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, preempts a state-law handicap discrimination claim based on an employer's alleged refusal to accommodate an employee's handicap where such accommodation is required only by a collective bargaining agreement, not by state law, and would require interpretation of the agreement.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

In addition to parties named in the caption, Louis Eovaldi and Lyndon Verlyndon were appellees in the court of appeals and are petitioners in this Court. A list of petitioner Chrysler Corporation's subsidiaries (other than wholly-owned subsidiaries) and affiliate corporations is set forth at App. F, *infra,* 53a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Chrysler Corporation, Louis Eovaldi, and Lyndon Verlyndon petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (App. A, *infra*, 1a-27a) is reported at 879 F.2d 1326. The order granting rehearing *en banc* and vacating the panel opinion (App. B, *infra*, 28a) is reported at 866 F.2d 838. The vacated panel opinion of the court of appeals (App. C, *infra*, 29a-41a) is reported at 858 F.2d 1165. The orders of the district court in *Smolarek* v. *Chrysler Corporation* (App. D, *infra*, 42a-47a) are unreported. The opinion and order of the district court in *Fleming* v. *Chrysler Corporation* (App. E, *infra*, 48a-52a) is reported at 659 F. Supp. 392.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1989 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * *.

Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. §173(d), provides in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Section 103(b)(i) of the Michigan Handicapper's Civil Rights Act, MCL 37.1103(b)(i); MSA §3.550(103)(b)(i), provides:

> "Handicap" means a determinable physical or mental characteristic of an individual * * * which characteristic * * * is unrelated to the individual's ability to perform the duties of a particular job or position, or is unrelated to the individual's qualifications for employment or promotion.

Sections 202(1)(b) and (c) of the Michigan Handicapper's Civil Rights Act, MCL 37.1202(1)(b) and (c); MSA §3.550 (202)(1)(b) and (c), provide that "[a]n employer shall not":

> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is

unrelated to the individual's ability to perform the duties of a particular job or position.

(c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

STATEMENT

Respondents Stanley Smolarek and Ralph Fleming allege in these cases that petitioner Chrysler Corporation refused to reinstate them to their hourly positions following disability absences. Their employment with Chrysler was governed by a collective bargaining agreement between Chrysler and respondents' exclusive bargaining representative, the United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW").

Both respondents suffer from medical conditions that required accommodation in their work activities (App., *infra*, 21a, 22a). The Chrysler-UAW collective bargaining agreement gives employees specific rights to handicap accommodation, including (1) the right to medical or disability leave if they develop a temporarily disabling medical condition; (2) the right to return to work after a disability, in accordance with seniority and certain procedures, including passing a medical examination; and (3) the right to "reasonable accommodation[] to an employee's handicap" including "place[ment] in accordance with his seniority, on job in his department or division that he can perform consistent with his assigned physical restrictions" (Fleming C.A. App. 101). The agreement also provides an elaborate grievance arbitration procedure for the resolution of disputes (Smolarek C.A. App. 91-97).

Respondents claim that Chrysler violated the Michigan Handicapper's Civil Rights Act ("HCRA") by failing to provide

the accommodation granted by the collective bargaining agreement. The trial courts found these HCRA claims preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. However, in an 8-7 *en banc* decision, the Sixth Circuit reversed.

Because respondents' HCRA claims are based on rights created solely by the Chrysler-UAW collective bargaining agreement, and not by state law, and because their claims would require interpretation of the collective bargaining agreement, they are preempted by Section 301. Any other result would conflict with federal labor policy requiring that labor disputes be resolved in accordance with uniform federal laws and would contravene the federal policy favoring resolution of collective bargaining disputes through arbitration.

1. *Smolarek's Claim.* Respondent Smolarek was a tool-and-die maker at Chrysler who, since 1955, was provided with accommodation of certain medical restrictions stemming from a seizure disorder (App., *infra*, 2a, 21a). In October 1984 Smolarek suffered a seizure at work and was disabled for two weeks (*id.* at 2a), during which time he was provided with a medical leave pursuant to the Chrysler-UAW collective bargaining agreement. Smolarek alleges that when he was released to return to work, he was told there was no work available consistent with his medical restrictions (*id.* at 3a).

Smolarek instituted this action in Michigan state court in 1986, claiming he had been denied reinstatement following a disability leave, and that this violated the HCRA. In particular, Smolarek alleged that he became "disabled * * * for approximately two weeks," that he thereafter reported back to work subject to certain medical restrictions, but that Chrysler

> * * * has refused to return plaintiff to his former position or another position consistent with his medical restrictions and has maintained plaintiff instead on disability lay-off indefinitely (Smolarek C.A. App. 5-6).

Chrysler removed Smolarek's suit to federal court on the basis that his claim that Chrysler was required to accommodate his medical restrictions actually arose under the Chrysler-UAW collective bargaining agreement and was preempted by federal law under Section 301. The district court denied Smolarek's motion to remand, finding that Smolarek's purported HCRA claim was preempted by Section 301 under this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985) (App., *infra*, 42a). Smolarek then stipulated to dismissal of his action for failure to exhaust contractual remedies (*id.* at 47a), and filed an appeal from the district court's decision denying his motion to remand.

2. *Fleming's Claim.* Fleming began work for Chrysler as a painter-glazer in 1976 (App., *infra*, 3a). As a result of an automobile accident in 1983, Fleming suffered "severe and permanent injuries" which, after he returned to work from a year-long disability leave, required medical restrictions on his activities as a painter-glazer (Fleming C.A. App. 12, 209). In 1984 Fleming allegedly was reinjured while leaving the Chrysler plant and was off work for ten days (Fleming C.A. App. 186). Fleming alleges that after his return from this disability he was given work assignments that were inconsistent with his medical restrictions (App., *infra*, 4a). Fleming was eventually laid off indefinitely due to lack of work, but he claims he was told he would not be recalled (*id.*).

Fleming filed an action in Michigan state court in 1985, claiming that he suffered from "severe and permanent injuries" which required "certain restrictions" on his work activities (Fleming C.A. App. 12). Fleming alleged that "instead of abiding by said restrictions, [he] was subsequently terminated" (*id.*). Fleming's complaint asserted four causes of action: (1) violation of the Michigan HCRA; (2) retaliatory discharge for intent to file a worker's compensation claim; (3) breach of an implied duty of good faith and fair dealing; and (4) intentional interference with the pursuit of his occupation (*id.*).

Chrysler removed the action to federal court on Section 301 preemption grounds. The district court denied Fleming's motion to remand for the reason that at least the claims for breach of good faith and fair dealing and interference with the pursuit of his occupation were preempted by Section 301. Fleming did not appeal the denial of his motion to remand.[1] Thereafter Fleming's deposition was taken in which he admitted he could not perform his job as a painter-glazer without "provisions" being made for his medical condition, and he claimed that Chrysler had a duty to make such "provisions" under the collective bargaining agreement (App., *infra,* 22a). Chrysler then filed a motion for summary judgment asserting that Fleming's HCRA and retaliatory discharge claims, like his other two claims, were preempted by Section 301 and subject to dismissal for failure to exhaust contractual remedies. The district court granted the motion and dismissed Fleming's entire complaint (*id.* at 48a, 52a). Fleming appealed only from the dismissal of his HCRA and retaliatory discharge claims.

3. *The Michigan Handicapper's Civil Rights Act.* The HCRA prohibits discrimination in employment on account of a "handicap," which is defined as a "determinable physical or mental characteristic" that "is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1103(b)(i) and 37.1202(1)(b), (c). In light of this definition, the Michigan Supreme Court has held that physical conditions that are "job related," and which therefore require "accommodation," are not "handicaps" subject to the protection of the HCRA. *Carr* v. *General Motors Corp., 425 Mich.* 313, 389 N.W. 2d 686 (1986).[2] It is thus beyond dispute that any right to

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[1] Thus, as the court of appeals recognized (App., *infra,* 15a), while Smolarek has preserved his challenge to the removal of his action under Section 301, Fleming has conceded the propriety of the removal and the existence of federal jurisdiction under Section 301.

[2] Following *Carr,* the Michigan Court of Appeals has held in three cases that labor contract-based handicap accommodation claims, like respondents' here, are preempted by Section 301. *Desjardins* v. *The Budd Company,* 175 Mich. App. 599, 438 N.W.2d 622 (1988); *Metro* v. *Ford Motor Company,* 169

accommodation arises from the Chrysler-UAW collective bargaining agreement, and not the Michigan HCRA.

4. *The Sixth Circuit Decision.* A three-judge panel of the Sixth Circuit issued an opinion on October 3, 1988, holding that Smolarek's and Fleming's HCRA claims were not preempted by Section 301 (App., *infra*, 29a-41a). On Chrysler's motion for rehearing *en banc*, the panel decision was vacated and the case was reheard by the entire bench of fifteen judges (App., *infra*, 28a). The *en banc* court ruled on July 12, 1989 (App., *infra*, 1a-27a).[3] A bare majority — eight of the fifteen judges — held that respondents' HCRA claims were not preempted. The seven dissenting judges believed respondents' HCRA claims were preempted, inasmuch as they arose *only* from the collective bargaining agreement, with the result that respondents were attempting to "bootstrap" negotiable contract rights into purported nonnegotiable HCRA claims (App., *infra*, 25a).

a. *The Majority Opinion.* The eight-judge majority opinion, written by Judge Wellford, acknowledged that these cases "present close and difficult questions" regarding the scope of Section 301 preemption (App., *infra*, 2a), but then proceeded to state the broad view that "§301 does not preempt state anti-discrimination laws" (*id.* at 11a), ostensibly based on *dictum* in *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ___, 108 S.Ct. 1877, 1885, 100 L.Ed.2d 410 (1988). The opinion did not address this Court's

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Mich. App. 549, 426 N.W.2d 700 (1988); *Cuffe* v. *General Motors Corp.*, 166 Mich. App. 766, 420 N.W.2d 874 (1988). An application for leave to appeal to the Michigan Supreme Court is presently pending in *Desjardins*. The Michigan Court of Appeals' decisions in *Metro* and *Cuffe* were vacated by the Michigan Supreme Court and remanded to the Court of Appeals for reconsideration in light of *Lingle*. 437 N.W.2d 634 (Mich. 1989). The Court of Appeals thereafter reaffirmed its Section 301 preemption holding in *Metro*, ___ N.W.2d ___ (Mich. App. Aug. 25, 1989), and the plaintiff has re-applied for leave to appeal to the Michigan Supreme Court. The Michigan Court of Appeals has not yet issued a decision on reconsideration in *Cuffe*.

[3] All fifteen judges agreed that, in light of this Court's decision in *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ___, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988), Fleming's retaliatory discharge claim was not preempted by Section 301. Chrysler does not seek review of that decision.

explanation in *Lingle* that "the operation of the anti-discrimination laws does, however, illustrate the relevant point for pre-emption analysis": whether "the existence or the contours of the state law violation [is] dependent upon the terms of the [labor] contract." *Id.*

Though the majority identified the specific allegations establishing that respondents sought accommodation for their medical conditions (App., *infra,* 11a, 15a), and noted that such accommodation would exceed rights or duties created by the HCRA (*id.* at 11a), it dismissed the fact that respondents' accommodation claims were rooted in the collective bargaining agreement. The majority instead concluded that the contract provisions merely constituted a "defense" to the HCRA claims, see *Caterpillar Inc.* v. *Williams,* 482 U.S. 386 (1987), and that, in any event, respondents' counsel had during oral argument "expressly disclaimed that they seek any collective bargaining agreement remedy" (App., *infra,* 13a-14a).

Lastly, the majority held that even though accommodation rights and procedures were governed by the collective bargaining agreement, resolution of respondents' HCRA discrimination claims simply turned on Chrysler's "motivation" — an inquiry deemed "independent" of the labor agreement under *Lingle* (*id.* at 15a).

b. *The Dissenting Opinion.* Seven judges dissented in an opinion by Judge Kennedy. After analyzing the specific allegations in respondents' complaints, the dissenting judges concluded that "Smolarek's claim is preempted to the extent that he claims a right to reinstatement to a position other than his former job" and that "Fleming's claim is preempted to the extent that he claims a right [to accommodation exceeding that provided by the HCRA] to enable him to perform his job" (App., *infra,* 19a).

Noting that "the question of whether removal jurisdiction exists based upon a federal question is answered by reviewing the complaint as of the time of removal," the dissenters found counsels' disclaimer at oral argument ineffectual: "The com-

plaints and the substance of [respondents'] claims do present a §301 federal question" because "[t]here is no right independent of the collective bargaining agreement to be reinstated to another job consistent with one's medical disability under the HCRA," citing *Carr* v. *General Motors Corp., supra* (App., *infra,* 20a-21a). Respondents' claims therefore arose from or were "inextricably intertwined with" the contract (*id.* at 22a).

Explaining that respondents were "ask[ing] us to wear blinders" by "simply asserting that [they have] a state-law tort claim" independent of the contract, Judge Kennedy's opinion observed that this Court had rejected that very view in *Electrical Workers* v. *Hechler,* 481 U.S. 851 (1987). The dissenters also rejected respondents' (and the majority's) over-generalization regarding non-preemption of state-law discrimination claims. While some claims (e.g., race, sex, and age discrimination) may "fall under the doctrine of complete parallelism, as explained * * * in *Lingle,*" the right to be free of such forms of discrimination "is independent of any ancillary right contained in a collective bargaining agreement" (App., *infra,* 24a). But in the present setting, the dissenters concluded, accommodation of a medical condition is a *negotiable* right provided only by contract which cannot be "bootstrap[ped]" into an HCRA claim without triggering Section 301 preemption (*id.* at 25a).

Finally, the seven dissenters warned of the majority's "overbroad precedent against finding §301 preemption" which would "permit[] an individual to sidestep available grievance procedures[,] * * * cause arbitration to lose most of its effectiveness, [and] eviscerate a central tenet of federal labor contract law under §301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lingle,* 108 S.Ct. at 1884; *Lueck,* 471 U.S. at 220.

REASONS FOR GRANTING THE PETITION

Over the past several decades this Court has repeatedly held that disputes between employers and employees directly relating

to the terms and conditions set forth in their collectively bargained labor contracts must be governed by a uniform body of federal law, with resolution of such disputes through contractual grievance arbitration procedures rather than judicial litigation. The court of appeals' 8-7 *en banc* decision, however, permits respondents and countless similarly situated employees to challenge their employers' actions concerning matters governed by a collective bargaining agreement in court simply by labeling their contract dispute as a "discrimination" claim and eschewing the grievance procedure set forth in that agreement.[4]

The court of appeals' *en banc* ruling thus conflicts with federal labor policy mandating that labor disputes be resolved in accordance with uniform federal laws and pursuant to grievance arbitration procedures. The court of appeals' decision cannot be squared with this Court's decisions in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987), or *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The court of appeals reasoned that respondents' claims in this case more closely resembled the claim in *Lingle* than that in *Lueck*. That is not so. In actuality, as the dissenters concluded, respondents' claims are *directly* founded on the collectively bargained right to accommodation of a medical condition, and fit precisely within this Court's statement in *Lingle* that a state-created remedy, "although nonnegotiable," is preempted by Section 301 if it "turn[s] on the interpretation of a collective-bargaining agreement for its application." 108 S.Ct. at 1882 n.7. Respondents' claims are, indeed, archetypal examples of state-created "discrim-

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[4] Forty-five states and the District of Columbia have enacted statutes prohibiting handicap discrimination. See Note, *Employee Drug Testing*, 74 Va. L. Rev. 969, 986 n.112 (1988). At least ten of these statutes, like Michigan's, do not require accommodation of job-related handicaps. See Ind. Code § 22-9-1-13 (1971); Neb. Rev. Stat. § 48.1101 *et seq*; Ga. Code Ann. § 66-504 (1979); Kan. Stat. Ann § 44-10 (1986); Ky. Rev. Stat. Ann. § 207.130 (1976); N.H. Rev. Stat. Ann. § 354-A (1977); S.D. Laws §20-B-1 *et seq.* (1986); S.C. Code Ann. § 43-33-60 (1983); Tex. Hum. Res. Code Ann. §121.003 (Vernon 1980); Nev. Rev. Stat. § 613.310 *et seq.* (1987).

ination" theories that must be held preempted because their resolution requires contract interpretation.

The lower courts have struggled with the proper application of *Lueck* and *Lingle* in similar cases involving a variety of state-law theories. The 8-7 split of the *en banc* Sixth Circuit in this case demonstrates the confusion in this area and the need for guidance from this Court, as does the 4-3 split of the Wisconsin Supreme Court on a similar Section 301 preemption issue in *IAM Local 437* v. *United States Can Co.*, 441 N.W.2d 710 (Wisc. 1989). This confusion has resulted in fundamentally different approaches to Section 301 preemption analysis, producing conflicting results in comparable cases and adding uncertainty to an area of the law that demands predictability and uniformity. Moreover, as we will demonstrate at pages 25-28, *infra*, the court of appeals' decision is at odds with the approach taken on the issue of Section 301 preemption by the Seventh and Eighth Circuits. Further review of this question is plainly warranted.

A. The Court of Appeals Has Decided An Important Federal Question In A Way That Cannot Be Reconciled With This Court's Decisions And That Threatens To Disrupt Federal Labor Relations Policy.

1. Federal law and policy preempt state claims that are rooted in or purport to define the meaning of collectively bargained terms and conditions of employment.

There is no dispute in this case that (1) respondents are bargaining unit employees whose employment is governed by the Chrysler-UAW collective bargaining agreement; (2) the labor agreement grants certain rights to return to work following medical disabilities, and prescribes procedures governing the return to work, which are not contained in the Michigan HCRA; (3) respondents were entitled to present their claims of denied accommodation pursuant to the labor contract's grievance arbitration procedure; and (4) respondents have instead presented these claims in state-law "handicap discrimination" actions. Respon-

dents thus seek to have their accommodation claims adjudicated by a court and jury under rules of Michigan law, rather than under uniform rules of federal labor law.

In these circumstances, however, federal labor law supersedes any state cause of action. The contrary decision of the court of appeals cannot be reconciled with the rulings of this Court or with the principles of federal labor policy reflected in those rulings.

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * *." In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), this Court held that Section 301 is not merely a jurisdictional statute but rather it "expresses a federal policy that federal courts should enforce these [collective bargaining] agreements" and that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 455, 456. Accordingly, in defining rights and responsibilities in the labor context, "[f]ederal interpretation of the federal law will govern, not state law." *Id.* at 457.

The Court examined the reason for this rule in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). "The dimensions of §301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy." *Id.* at 103. Disputes over the meaning of a collective bargaining agreement therefore cannot be left to state law because "the subject matter of §301(a) 'is peculiarly one that calls for uniform law.' " *Id.* As the Court further explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult * * *. *Id.*

In short, "in enacting §301, Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour*, 369 U.S. at 104. Indeed, the "pre-emptive force of §301 is so powerful as to displace entirely *any* state cause of action" that contends, explicitly or implicitly, that an employer breached its obligations under a labor contract. *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (emphasis added). "[A]ny complaint that comes within the scope of the federal cause of action" — even though "pleaded [as] an adequate claim for relief under * * * state law" and even though seeking "a remedy available *only* under state law" — is "purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of §301." *Id.* at 23-24. See also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55-56 (1987).

In the last five years this Court has issued a series of opinions that have applied these principles of federal labor policy to a variety of state-law claims. First, in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), an employee brought a tort suit in Wisconsin state court, contending that his employer had "intentionally, contemptuously, and repeatedly failed" to make disability insurance payments under a collectively bargained disability plan. *Id.* at 206. The Wisconsin Supreme Court rejected the employer's argument that federal law preempted the employee's state-law claim, asserting that the employee's suit did not arise under Section 301 because "[u]nder Wisconsin law, the tort of bad faith is distinguishable from a bad-faith breach of contract" and "is independent of that contract." *Id.* at 207. The Wisconsin court additionally held that "[p]ermitting the state action to

proceed would not have an adverse impact on the effective administration of national labor policy, since the courts will make no determination as to whether the labor agreement has been breached." *Id.* at 207-208.

This Court unanimously reversed, explicitly rejecting the notion — accepted by the court of appeals here — that the addition of a motivational factor (e.g., bad faith) to a contract-based claim avoided preemption under Section 301. *Id.* at 211. The Court held that the employee's state-law tort suit was preempted by Section 301 because "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 218. The Court observed:

> If the policies that animate § 301 are to be given their proper range, * * * the pre-emptive effect of §301 must extend beyond suits alleging contract violations. These policies require that "the relationships created by [a collective bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy." * * * The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. *Id.* at 210-211.

The Court further noted that "[a]ny other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims" as claims under state law. *Id.* at 211.

The Court in *Lueck* recognized that, if state law were allowed to determine the meaning of collectively bargained con-

tract language, "all the evils addressed in *Lucas Flour* would recur" (*id.*):

> The parties would be uncertain as to what they were binding themselves to when they agreed to create a right * * *. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.

Importantly, the Court reasoned that preempting Lueck's tort claim was the *only* result that "preserves the central role of arbitration in our 'system of industrial self-government.' " *Id.* at 219, citing *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). The Court cautioned that "[p]erhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement." *Id.* at 219. The Court concluded:

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965), as well as eviscerate a central tenet of federal labor-contract law under §301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance. *Id.* at 220.

With these conceptual underpinnings, the Court in *Lueck* fashioned a test governing Section 301 preemption that

> when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a §301 claim, * * * or dismissed as preempted by federal labor-contract law. *Id.* at 220.

This Court next addressed these Section 301 policy issues in *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987). In that case an injured bargaining unit employee sued her union under a state-law tort theory, claiming that it had breached a duty to ensure safety in the workplace. *Id.* at 853. She asserted that liability

would simply turn on state-law negligence principles. *Id.* at 854-855. This Court unanimously disagreed. After re-examining the policy underpinnings of *Lucas Flour* and *Lueck,* the Court held that the alleged duty of the union arose, if at all, from the collectively bargained agreements between the union and the employer, and that "questions of contract interpretation * * * underlie any finding of tort liability.' " *Id.* at 862. The Court stated:

> The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers,* respondent is precluded from evading the preemptive force of § 301 by casting her claim as a state-law tort action. *Id.* (footnote omitted).[5]

Last year, in *Lingle* v. *Norge Division of Magic Chef,* 486 U.S. ___ , 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), the Court revisited these Section 301 preemption principles in a case representing the opposite end of the spectrum from *Lueck* and *Hechler.* Lingle sued in Illinois state court alleging that she had been discharged in retaliation for exercising her rights under the Illinois workers' compensation law. 108 S.Ct. at 1879. Lingle's union also filed a grievance on her behalf under the collective bargaining agreement contending that she had been discharged without "just cause"; an arbitrator ultimately ruled in Lingle's favor, ordering reinstatement with full backpay. *Id.*

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[5] In the same Term, in *Caterpillar Inc.* v. *Williams,* 482 U.S. 386 (1987), the Court unanimously held that an employer's removal of a lawsuit to federal court was improper because the "complete pre-emption" corollary to the well-pleaded complaint rule under Section 301, see *Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557 (1968), did not apply to claims for breach of *individual* employment contracts. *Id.* at 393-395. The employees in *Caterpillar* claimed that their employer had made individual promises (regarding the duration of employment) to them while in *non-union* positions. *Id.* at 388. They were later downgraded to union positions, and ultimately laid off. *Id.* at 389. Their state lawsuit eschewed reliance on the collective bargaining agreement. However, in finding the *individual* contract claims not preempted by Section 301, the Court reaffirmed its holdings in *Lueck* and *Hechler* that "[w]hen a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim * * *." *Id.* at 399.

In the meantime, the employer removed Lingle's retaliatory discharge suit to federal court, and argued that it should be dismissed under *Lueck* as preempted by Section 301. The district court agreed and dismissed the suit, and the Seventh Circuit affirmed. The court of appeals reasoned that "the same analysis of the facts" was implicated under both the "just cause" discharge grievance and the retaliatory discharge lawsuit. *Id.*

This Court reversed, once again unanimously. The Court reaffirmed the federal labor policies upon which *Lueck* and *Hechler* were grounded, but ruled that Lingle's state retaliatory discharge claim fell outside the rationale and holding of those cases because "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 1882 (footnote omitted). In contrast, the Court noted, in *Lucas Flour, Lueck,* and *Hechler* "pertinent principles of state law required construing the relevant collective-bargaining agreement. Not so here." *Id.* at 1882 n.7. The Court in *Lingle* stated the following test:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles — necessarily uniform throughout the nation — must be employed to resolve the dispute. *Id.* at 1881 (footnote omitted).

Thus, while a mere "parallel" factual analysis between a labor contract claim and a state-law claim would be insufficient to produce Section 301 preemption, *id.* at 1883, the Court emphasized that a state-law remedy, "although nonnegotiable," could "nonetheless turn[ ] on the interpretation of a collective-bargaining agreement for its application," or that "a law appli[cable] to all state workers" could require, "at least in certain instances, collective-bargaining agreement interpretation" — and in both situations the state-law remedy would be preempted by Section 301. *Id.* at 1882 n.7.

The Court in *Lingle* additionally reiterated the admonition in *Lucas Flour* and *Lueck* that "[a] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, * * * as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 1884, citing *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29 (1987), and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Its decision in *Lingle*, the Court concluded, "should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm." *Id.*

2. Resolution of respondents' claims under state law would destroy the uniformity essential to interpretation of the collective bargaining agreement.

In analyzing respondents' Michigan HCRA claims to determine whether they were preempted by Section 301, the eight judges of the Sixth Circuit *en banc* majority committed the same error as the lower courts in *Lueck* and *Hechler*: failing to recognize that the state-law claims were both rooted in and required interpretation of the collective bargaining agreement. Resolution of respondents' "handicap discrimination" claims unquestionably would require interpretation of the provisions of the Chrysler-UAW labor contract, which is the *sole* source of any right to accommodation in view of the Michigan Supreme Court's construction of the HCRA in *Carr* v. *General Motors Corp.*, *supra*. In this circumstance, it cannot be disputed that at least one aspect of respondents' HCRA claims "depends upon the meaning of a collective-bargaining agreement." *Lingle*, 108 S.Ct. at 1881.

The court of appeals' opinion in fact suggested, in broad terms, that this Court's *Lingle* decision may have approved a bright-line rule that Section 301 cannot preempt claims under state anti-discrimination laws (App., *infra*, 11a, 13a). In addition, the majority held that the accommodation provisions of the Chrysler-UAW collective bargaining agreement constitute mere "defenses" to respondents' HCRA claims that cannot produce

Section 301 preemption under *Caterpillar* (App., *infra*, 13a, 16a). What is more, the majority implied that respondents' disclaimer during oral argument "that they seek any collective bargaining agreement remedy" (*id.* at 13a) is somehow relevant or controlling when respondents' pleadings show otherwise. The court of appeals has thus disregarded the teachings of this Court's decisions in a fashion that has significant ramifications for the important federal interest in interpretive uniformity and predictability of contract terms and the federal policy favoring grievance arbitration as the exclusive means of resolving disputes.

As noted above, *Lingle* made plain that a variety of state law claims, even though representing *nonnegotiable* rights, would be preempted by Section 301 if, "at least in certain instances," they "turned on the interpretation of a collective-bargaining agreement." *Lingle*, 108 S.Ct. at 1882 n.7. The Court accordingly did not close the door to Section 301 preemption for all claims under state anti-discrimination laws. To the contrary, claims predicated on state anti-discrimination laws must be carefully scrutinized — as the Court scrutinized other state-law claims in *Lueck, Hechler*, and *Lingle* — to determine whether, "at least in certain instances, collective-bargaining agreement interpretation" is required for adjudication of the discrimination claim. *Id.* Indeed, the Court explicitly noted in *Lingle*, 108 S.Ct. at 1885, that anti-discrimination laws themselves "illustrate the relevant point for §301 preemption analysis" — whether "the existence or the contours of the state law violation [is] dependent upon the terms of the [labor] contract." While analysis of some state-law discrimination claims brought by union-represented employees may show that they are not preempted, other claims clearly will be preempted, and respondents' HCRA claims in the present case are archetypal examples of claims that are preempted. The apparent bright-line rule suggested by the court of appeals for discrimination claims is both wrong and inimical to the important federal policies underlying Section 301 preemption.[6]

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[6] Handicap accommodation claims by unionized workers often raise special preemption issues because an employee's physical or medical ability to perform

This Court held in *Lueck, Hechler*, and *Lingle* that it is necessary to focus on precisely what respondents must establish to prove *their particular* state-law claims — not the generic elements of an abstract claim, as the court of appeals did here (App., *infra*, 15a). The court of appeals essentially held that a discriminatory *motive* is all that respondents need establish in a discrimination case, and that establishing *motive* is unrelated to the terms of the bargaining agreement. This simplistic reasoning would, contrary to *Lingle*, apply to all disparate treatment discrimination claims. That reasoning ignores the source of the claimed right to accommodation which *in this instance* forms the basis of the HCRA suit: the collective bargaining agreement. Moreover, this Court in *Lueck*, 471 U.S. at 211, emphatically rejected the notion that the addition of a motivational factor (e.g., bad faith) to a contract-based claim would avoid preemption under Section 301.

Scrutiny of respondents' complaints demonstrates that their HCRA claims are grounded in the Chrysler-UAW agreement. Smolarek claimed a right to reinstatement to "his former position or another position consistent with his medical restrictions" (App., *infra*, 20a), a remedy not available under the HCRA but allegedly available under the labor agreement. Fleming's complaint likewise claimed a right to reinstatement to another position, and to "reasonable accommodations so as to allow [Fleming] to work despite his physical determinable handicap * * * *" (*id.* at 22a). In the instances of these particular "discrimination" claims, both respondents have unquestionably

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a job is a subject that employers (and unions) must inevitably address, and frequently do in collective bargaining agreements — often creating *favored* treatment exceeding that required by state anti-discrimination laws. See 2 Bureau of National Affairs, *Collective Bargaining Negotiations And Contracts, Basic Patterns In Union Contracts* 75:4 (1989) (33 percent of all collective bargaining agreements, and 44 percent in the manufacturing sector, grant special rights to employees no longer able to perform their regular work). That type of *favored* treatment is precisely what Chrysler and the UAW negotiated here. Because *favored* treatment is in issue, rather than adverse discriminatory treatment, these "handicap discrimination" claims are far different from typical disparate treatment discrimination claims.

asserted rights rooted in the collective bargaining agreement, because they exist nowhere else.

Moreover, adjudication of respondents' discrimination claims, in these instances, would require interpretation of the collective bargaining agreement to ascertain whether, and under what circumstances, they may be entitled to reinstatement to a former position, or to a different position, or to some other form of accommodation for their medical conditions. The agreement prescribes the procedures for accomodation as well. These are not "defenses" to an independent state-law claim, as was the case in *Caterpillar*. They are affirmative elements of respondents' claims. Nor are these mere factually "parallel" inquiries under the HCRA and the collective bargaining agreement, as was the case with the "just cause" and "retaliatory discharge" claims in *Lingle*. Here the inquiries are one and the same. It is *only* because of the collective bargaining agreement that the inquiry is made at all. The HCRA independently grants no such rights. It prescribes no procedures. "Since the extent of [the accommodation] duty depends upon the terms of the agreement between the parties, both are tightly bound with questions of contract interpretation that must be left to federal law." *Lueck*, 471 U.S. at 216. The court of appeals was thus plainly mistaken in its application of *Lingle* and *Caterpillar*, and has permitted respondents "to evade the requirements of §301 by relabeling their contract claims" as state-law discrimination claims. *Lueck*, 471 U.S. at 211.

The court of appeals' decision is not merely mistaken. It threatens to disrupt federal labor policy. If "state law [were] allowed to determine the meaning intended by the parties in adopting" the labor contract's provisions concerning accommodation, "all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211. A single provision in a nationwide labor contract, such as that negotiated by Chrysler and the UAW (which covers over 60,000 employees in 17 States), may well be given a different meaning under the local discrimination or tort laws of one State than those of another. Michigan HCRA cases are tried to juries. Uniformity and predictability would accordingly be

destroyed. State law as discerned by a local jury would be substituted for the "law of the shop." This "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour*, 369 U.S. at 103.

Equally damaging to federal labor policy would be any attempt to award respondents relief under their state-law claims. Smolarek's complaint, for example, demanded reinstatement to a job, accommodation of his medical condition, lost compensation and benefits, and seniority — all of which must be ascertained under provisions and procedures of the Chrysler-UAW collective bargaining agreement (Smolarek C.A. App. 6). Permitting state court judges and juries to grant such relief, under the guise of a discrimination claim, would inevitably implicate and undermine the very foundations of the Chrysler-UAW agreement. A judge or jury could impose duties and create special privileges that are utterly inconsistent with the agreement and could severely prejudice the rights of respondents' co-workers and other members of the bargaining unit. Needless to say, this would "frustrate[ ] the effort of Congress to stimulate the smooth functioning of [the collective bargaining] process" and would "strike[ ] at the very core of federal labor policy." *Lucas Flour*, 369 U.S. at 104.

In summary, it is impossible *in this instance* to resolve respondents' HCRA claims without applying or interpreting the accommodation provisions of the collective bargaining agreement. They are packaged as "handicap discrimination" claims, but it is undisputed that the Michigan HCRA does not provide for the type of accommodation sought by respondents. Their claims are grounded, if at all, on the collective bargaining agreement. A judge or jury purporting to address their handicap discrimination claims would inevitably be forced to define the rights and responsibilities created by the agreement. The negotiation and administration of the agreement would thereby be subverted. As the Court held in *Lueck*, 471 U.S. at 211, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law * * *."

3. Resolution of respondents' claims under state law would frustrate the strong federal policy requiring settlement of labor disputes through arbitration.

The court of appeals did not consider the corrosive effect of its decision on one of the fundamental tenets of federal labor policy — the preservation of "the central role of arbitration in our 'system of industrial self-government.' " *Lueck*, 471 U.S. at 219, quoting *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). See also *Lingle*, 108 S.Ct. at 1884. As the opinion of the seven dissenting Sixth Circuit judges warned, the majority's "overbroad precedent against finding §301 preemption" clearly endangers the role of labor arbitration, and "permit[s] an individual to sidestep available grievance procedures," citing *Lingle*, 108 S.Ct. at 1884 (App., *infra*, 26a-27a). It is uncontroverted that respondents' accommodation claims could have been prosecuted through the labor agreement's comprehensive grievance arbitration procedure. Respondents have nonetheless been permitted by the court of appeals' decision to sidestep that remedy.

The established policy of peacefully resolving labor contract disputes through grievance arbitration, see Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), is greatly undermined by the court of appeals' decision. To "permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it." *Republic Steel* v. *Maddox*, 379 U.S. 650, 653 (1965). "[I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." *Id.* The critical importance of this policy favoring dispute resolution through arbitration was recently affirmed in *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29, 36-38 (1987).[7]

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[7] See also *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Employers that have negotiated exclusive grievance arbitration procedures are denied the benefit of their bargain when, as here, they are forced to litigate before state court judges and juries claims that are grounded in the contract and can (and should) be resolved through contractual procedures. As noted earlier, a multi-state employer that has negotiated a nationwide collective bargaining agreement could well have differing liabilities under the same contractual provision — depending upon the State in which it is decided or the local judge or jury that acts as fact-finder.

As is the case with other disputes over contractual rights and benefits, labor arbitrators are uniquely qualified to interpret and enforce the accommodation provisions of the Chrysler-UAW agreement. See *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581-582 (1960); *Paperworkers* v. *Misco, Inc., supra.* An arbitrator would unquestionably possess the power to determine whether respondents were entitled to be placed in their former positions, or in different positions, or otherwise to have their medical conditions accommodated. If the arbitrator concluded that Chrysler had breached the contract, he would be empowered to award affirmative relief and compensation.

The critical point, however, is that whatever relief the arbitrator awarded would have been fashioned with due regard to the rights and responsibilities contained in the collective bargaining agreement as a whole, as modulated by the "law of the shop," and with an appreciation for the interests of all affected parties. A judge or jury awarding relief on respondents' HCRA claims, by contrast, could ride roughshod over the rights and expectations of the parties involved. Thus, preemption of respondents' claims under Section 301 is the only means of avoiding the "disruptive influence" of "contract terms hav[ing] different meanings under state and federal law," *Lucas Flour,* 369 U.S. at 103, and "mak[ing] clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm * * *." *Lingle,* 108 S.Ct. at 1884.

In the final analysis, the issue in this case, as in many labor preemption cases, is not whether respondents may object to the manner in which they were treated by their employer, but in *what forum* they may object and *under what substantive law and procedures.* This Court has already answered that question: "in enacting §301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour,* 369 U.S. at 104. The decision below is out of step with this principle. It makes "the process of negotiating an agreement * * * immeasurably more difficult," *id.* at 103, and clearly jeopardizes "the Congressional goal of a unified federal body of labor-contract law." *Lueck,* 471 U.S. at 220.

B. The Court of Appeals' Approach Conflicts With That Of Other Circuits

The sharp disagreement between the majority and the dissenting judges in the court of appeals mirrors the conflict of approach among the courts of appeals in factually similar cases. The circuits are divided as to the scope of Section 301 preemption, as well as the proper analysis under the tests set forth in *Lueck* and *Lingle.*

The Seventh Circuit's approach in *Douglas* v. *American Information Technologies Corp.,* 877 F.2d 565 (7th Cir. 1989), demonstrates the conflict with the Sixth Circuit's approach. In *Douglas* the plaintiff alleged that she suffered from physical or medical conditions that prohibited certain work, and claimed that her employer had denied her excused work days, subjected her to unjustified scrutiny, and disciplined and threatened her with discharge without justification. *Id.* at 567-568. Rather than pursuing a grievance under her collective bargaining agreement, and rather than asserting a handicap discrimination claim as respondents did here, Douglas sued on a state-law theory of "intentional infliction of emotional distress." *Id.* at 568.

Properly applying this Court's holdings in *Lucas Flour, Lueck,* and *Lingle,* the Seventh Circuit ruled that Douglas' state-law claim was preempted by Section 301. The court of appeals reasoned that her claim, upon scrutiny, pertained directly to terms and conditions established by the collective bargaining agreement,

such as excused work days, work scrutiny, discipline, and discharge, and that "[r]esolution * * * will require a court to interpret the collective bargaining agreement in order to determine whether or not [her employer's] allegedly wrongful conduct was authorized under the collective bargaining agreement." 877 F.2d at 572.

In sharp contrast, the Sixth Circuit held here that even though respondents' HCRA claims depended directly on accommodation rights provided in the Chrysler-UAW collective bargaining agreement, that agreement was merely a "defense" to a state-law claim that itself required no interpretation of the agreement. In addition, also in conflict with the Seventh Circuit's *Douglas* analysis, the Sixth Circuit merely focused on the generic elements of an abstract discrimination claim (especially "motivation") rather than factually scrutinizing the particular claim being made, as mandated by *Lingle*, to determine its relationship to the labor contract.

The approach to Section 301 preemption utilized by the Eighth Circuit in *Johnson* v. *Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), likewise conflicts with that of the Sixth Circuit. A union-represented employee there sued under eight separate state-law theories, all arising from his discipline and discharge for allegedly slashing tires in the company parking lot. Following the directive of *Lingle*, the Eighth Circuit scrutinized the factual proofs pertinent to each claim to ascertain whether it arose from the collective bargaining agreement or required its interpretation. *Id.* at 624-625. It held some claims preempted and others not. One libel claim was preempted because it implicated collectively bargained plant rules, and "any judicial resolution of this libel allegation would necessarily involve construction of the collective bargaining agreement." *Id.* at 624. But a second libel claim concerning a post-discharge communication was held not preempted because it required no contract interpretation. *Id.* at 625. It is this claim-sensitive analytical approach, mandated by *Lingle* and *Lueck*, that the Sixth Circuit failed to undertake here.[8]

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[8] See also *Nash* v. *AT&T Nassau Metals*, 381 S.E.2d 206 (S.C. 1989), in which the South Carolina Supreme Court ruled that a union-represented

While the foregoing decisions held lawsuits preempted that had been packaged as state-law contract or tort claims,[9] rather than as handicap discrimination claims,[10] the factual and legal similarities between those cases and the instant one are manifest. The conflict in approach is also manifest. Regardless of an

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employee's state-law tort and contract claims, stemming from his employer's actions following a disability, were all preempted by Section 301 because the claims turned on contractual benefits and procedures set forth in the collective bargaining agreement. The South Carolina Supreme Court admonished that the lower court, in rejecting Section 301 preemption, had "failed to follow the directive of *Lueck* * * * that preemption be decided on a case-by-case basis." *Id.* at 209. The same is true of the Sixth Circuit's opinion here.

[9] Other Section 301 preemption decisions adopting the approach utilized in *Douglas* and *Johnson* include *Jackson* v. *Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3158 (1989) (privacy claims preempted inasmuch as they "do not rest upon inalterable state-law rights which float free of, and therefore do not require interpreting, the collective bargaining agreement"); *Hanks* v. *General Motors Corp.*, 859 F.2d 67 (8th Cir. 1988) (wrongful discharge claim preempted, other claims remanded for consideration of specific factual allegations); *Newberry* v. *Pacific Racing Assoc.*, 854 F.2d 1142 (9th Cir. 1988) (breach of implied covenant of good faith claim preempted); *Laws* v. *Calmat*, 852 F.2d 430 (9th Cir. 1988) (constitutional claim challenging drug testing preempted).

[10] The Ninth Circuit has considered Section 301 preemption of "handicap discrimination" claims in two cases, *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) (Oregon law); and *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988) (California law). These opinions — in which the Ninth Circuit held that claims were *not* preempted — are not pertinent because the state handicap discrimination statutes at issue affirmatively required accommodation whereas the Michigan HCRA does not. See note 3,4 *supra*. The employees in *Miller* and *Ackerman* were accordingly relying upon statutory rights to accommodation which were "parallel" to any rights under a collective bargaining agreement. Compare *Lingle*, 108 S.Ct. at 1883, 1885.

The opposite is true here. As the Michigan Court of Appeals recently held on remand in *Metro* v. *Ford Motor Company, supra*, note 2, in the context of Michigan HCRA claims identical to respondents' here:

> Plaintiffs' complaints alleged that they were discriminated against due to their handicaps when they were denied their seniority rights under their collective-bargaining agreement. These claims do not merely allege discrimination which could also be the subject of a grievance action under the collective-bargaining agreement. Instead, plaintiff's claims rely upon seniority rights provided for under their collective-bargaining agreement in order to establish their discrimination claims. The resolution of plaintiffs' MHCRA claims would involve interpretation of their collective-bargaining agreement in order to determine plaintiffs' seniority rights and whether they were violated. Plaintiffs' claims require interpretation of the collective-bargaining agreement, so they are preempted by §301. Slip. Op. at 2.

employee's choice of state-law labeling — be it "discrimination," "tort," or something else — "the relevant point for §301 pre-emption analysis" is whether "the existence or the contours of the state-law violation [is] dependent upon the terms of the [labor] contract." *Lingle* 108 S.Ct. at 1885. "Any other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims" as state-law actions. *Lueck*, 471 U.S. at 211.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1989

APPENDICES

Appendix A

Nos. 86-2074/87-1387

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STANLEY SMOLAREK,
Plaintiff-Appellant, (86-2074)

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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RALPH FLEMING,
Plaintiff-Appellant, (87-1387)

v.

CHRYSLER CORPORATION, a Delaware Corporation; LOUIS EBALDI and LYNDON VERLYNDON, jointly and severally,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed July 12, 1989

Before: ENGEL, Chief Judge; KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD,

MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges; and PECK, Senior Circuit Judge.

WELLFORD, J., delivered the opinion of the court, in which KEITH, MERRITT, MARTIN, JONES, MILBURN and NORRIS, JJ., and PECK, S. J., joined. KENNEDY, J., (pp. 19-27) delivered a separate opinion concurring in part and dissenting in part, in which ENGEL, C. J., KRUPANSKY, GUY, NELSON, RYAN, and BOGGS, JJ., joined.

WELLFORD, Circuit Judge. These combined cases present close and difficult questions regarding whether § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts plaintiffs' actions claiming violations of Michigan's Handicappers' Civil Rights Act, M.C.L. § 37.1101 *et seq.* (HCRA), and retaliatory discharge in violation of public policy relating to the filing of workers' compensation claims. In each case the district court found plaintiff's state cause of action preempted by § 301 and dismissed the suit for failure to exhaust remedies. The Supreme Court's recent decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), holding that an action under Illinois law for the tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301, guides our decision in these cases.

SMOLAREK

Smolarek was employed by Chrysler from 1953 until his lay off in 1984 and was a member of the United Automobile Workers (UAW).[1] Since an injury in 1955, Smolarek has suffered from a seizure disorder, which normally has been controlled by medications. In October 1984, he suffered a seizure at work and was absent from work for the following two weeks. When he returned to work, he was informed that no

[1]The UAW has filed an amicus curiae brief in the *Smolarek* appeal arguing for reversal of the district court's judgment.

jobs consistent with the medical restrictions, under which he had worked for nearly thirty years, were available. In 1985 Smolarek again attempted to return to work and was told no work was available within his restrictions. Plaintiff alleges that at that time his foreman made the comment, "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack."

In April 1986, Smolarek filed a two count complaint in Michigan state court alleging discrimination under the HCRA and workers' compensation retaliation. He claimed that Chrysler discriminated against him by refusing to return him to his former position based on a handicap unrelated to his ability to perform his job duties, and that Chrysler also refused to reinstate him based on its fear that he might injure himself during a seizure on the job and file a workers' compensation claim. Smolarek did not allege any violation of the collective bargaining agreement between the UAW and Chrysler.

Chrysler removed the case to federal district court claiming federal question jurisdiction. Smolarek filed a motion to remand, which the district court denied on the grounds that § 301 preempted Smolarek's claims. The district court then dismissed Smolarek's action because he had failed to exhaust his intra-union remedies before filing a § 301 action. Smolarek now appeals the district court's denial of his motion to remand solely on the handicap discrimination issue.

FLEMING

Chrysler hired Fleming, also a UAW member, in 1976 as a painter-glazer. In August 1984 Fleming was injured while leaving the Chrysler plant, and as a result he suffered some loss of balance, severe headaches, muscle spasms in his back, and nausea. Fleming continued to work with some medical restrictions on the kind of work he could do. Fleming claims

that following his injury he was given job assignments inconsistent with his limitations. Fleming further contends that this "harassment" increased when he expressed his intent to file a workers' compensation claim. In October 1984, Fleming was laid off indefinitely. Chrysler claims his lay off was due to lack of work, as allowed by the collective bargaining agreement. Fleming claims that, while technically on lay off, he was told he was being dismissed.

In December 1984 Fleming grieved his lay off. This grievance was pursued to the third step of a four-step grievance procedure before Fleming voluntarily terminated his employment in May 1986 by relinquishing his recall rights as part of a settlement of his workers' compensation claim filed in February 1985.

Fleming filed a complaint in state court in July 1985, alleging violation of HCRA, discharge in retaliation for expressed intent to file a workers' compensation claim, breach of implied duty of good faith and fair dealing, and intentional interference with his quiet and peaceful pursuit of a lawful occupation. In August 1985 Chrysler removed the suit to federal district court. In October 1985 the district court denied Fleming's motion to remand on the grounds that the latter two counts of Fleming's complaint conferred original jurisdiction on the federal court.

Chrysler then filed a motion for summary judgment arguing that Fleming's claims were preempted by § 301. Finding that all of Fleming's claims were preempted, the district court granted the motion and dismissed the case. Fleming appeals this dismissal only with regard to the HCRA and retaliatory discharge claims.

Removal and § 301 Preemption

Ordinarily, the question of removability to federal court under 28 U.S.C. § 1441 turns upon application of the "well-pleaded complaint rule." Federal jurisdiction exists

only when a plaintiff's properly pleaded complaint presents a federal question on its face.

> The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint. *See Gully v. First National Bank,* 299 U.S. 109, 112-113, 57 S. Ct. 96, 97-98, 81 L.Ed. 70 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid the federal jurisdiction by exclusive reliance on state law.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (footnote omitted); *see also Oklahoma Tax Comm'n v. Graham,* 109 S.Ct. 1519, 1521 (1989) (per curiam) (discussing *Caterpillar*). In the context of employment-related actions, however, a claim purportedly based solely on state law may, under appropriate circumstances, be removable because § 301 of the LMRA has preempted that particular area of state law. In other words, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar,* 482 U.S. at 393. Thus, in the cases we now consider, the issues of federal preemption and removability largely merge; we must focus on whether plaintiffs' state-law claims are preempted by § 301 so as to place them within the scope of the "complete preemption" corollary to the well-pleaded complaint rule.

In a series of cases, the Supreme Court has made clear that § 301 of the LMRA preempts any state-law claim arising from a breach of a collective bargaining agreement. *See Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957); *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *see also Lingle v. Norge Division of Magic Chef, Inc.,*

108 S. Ct. 1877 (1988). The purpose of this rule is to require that all claims raising issues of labor contract interpretation be decided according to the precepts of federal labor law in order to prevent inconsistent interpretations of the substantive provisions of collective bargaining agreements. *Lucas Flour*, 369 U.S. at 103.

> Thus, *Lueck* faithfully applied the principle of § 301 preemption developed in *Lucas Flour*: if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.

Lingle, 108 S. Ct. at 1881 (footnotes omitted).

In *Allis-Chalmers v. Lueck*, the Court expanded the preemptive reach of § 301 to state-law tort claims. In *Lueck* the Court considered whether a state-law cause of action for bad faith handling of an insurance claim was preempted because the insurance plan provisions were included in a collective bargaining agreement. The Court found the state claim was preempted because an essential element of the tort (*i.e.*, bad faith handling) required interpretation of the labor agreement regarding whether the plaintiff was due payments. Because the duty claimed to have been breached was "derive[d] from the rights and obligations established by the contract," the Court reasoned that "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 217, 218.

Although the Court limited its holding in *Lueck* to the specific facts of that case and made clear that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement... necessarily is

pre-empted by § 301," *id.* at 220, the Court did attempt to define the preemptive scope of § 301:

> Our analysis must focus, then, on whether the [state-law cause of action] confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state-law] claim is inextricably intertwined with consideration of the terms of the labor contract.

Id. at 213.

At the same time, we must keep in mind that

> Section 301 does not ... require that all "employment-related matters involving unionized employees" be resolved through collective bargaining and thus be governed by a federal common law created by § 301.... The Court has stated that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the *federal* labor law." *Allis-Chalmers*, 471 U.S. 202, 211, 105 S. Ct. 1904, 1911, 85 L.Ed.2d 206 (1985).

Caterpillar, 482 U.S. at 396 n.10 (emphasis added). *See also Oklahoma Tax Comm'n v. Graham*, 57 U.S.L.W. 4400, 4405 (1989) (per curiam). The Supreme Court has recently then reiterated what it stated earlier: "[E]ven under § 301 we have never intimated that any action relating to a contract within the coverage of § 301 arises exclusively under that section." *Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n.28 (1983); *see also Caterpillar*, 482 U.S. at 396 n. 10: "The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA does *not* establish that they are removable to federal court." *Caterpillar*, 482 U.S. at 398 (footnote omitted) (emphasis added).

In its recent decision addressing asserted § 301 preemption of state-law claims, the Supreme Court has attempted to clarify its language in *Lueck* regarding what kind of "independence" of state-law actions from collective bargaining agreements permits a finding of non-preemption. In *Lingle*, 108 S. Ct. 1877 (1988), the Court held that a unionized employee's state-law action based on Illinois's tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301 because "the state-law remedy ... is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: *resolution of the state-law claim does not require construing the collective-bargaining agreement.*" 108 S. Ct. at 1882 (emphasis added) (footnote omitted). In so concluding, the Court rejected the contentions of the employer that the retaliatory discharge action was not independent because resolution of the state-law claim would implicate the same factual analysis as would a grievance brought under the CBA's "just cause" provision. *Id.* Thus, *Lingle* stands as the Court's latest word on § 301's preemptive scope and, as such, will guide our decision in these cases.

The Workers' Compensation/Retaliatory Discharge Claim

Fleming filed a state-law suit claiming that he was effectively discharged (technically, he was laid off) because of his expressed intention to file a workers' compensation claim. The district court found that Fleming's state-law claim was preempted by § 301, and Chrysler argues that this decision was correct because the retaliatory discharge claim is inextricably intertwined with the terms of the collective bargaining agreement.

Fleming's claim is essentially the same as the claim that the Court addressed in *Lingle*. In order for a plaintiff to show retaliatory discharge under Michigan law, he must demonstrate that he was discharged by his employer in retaliation for the filing of a lawful claim for workers' compensation.

See Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151, 154 (1976). As the Court reasoned in *Lingle*: "Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882. Consequently, here, as in *Lingle*, the state-law tort of retaliatory discharge creates rights independent of those established by the collective bargaining agreement and hence is not preempted by § 301. *See also Dougherty v. Parsec, Inc.*, No. 86-3482, slip op. (6th Cir. Apr. 18, 1989); *Benton v. Kroger Co.*, 635 F. Supp. 56 (S.D. Tex. 1986).

Whether Fleming's claim of retaliatory discharge under these circumstances will be deemed to state a proper cause of action in state court is a question we do not decide. It is a state claim, sufficiently set out as separate and apart from a collective bargaining contract claim, and thus avoids preemption. Chrysler has cited *Wilson v. Acacia Park Cemetery*, 162 Mich. App. 638, 413 N.W.2d 79 (1987), in support of its position, but applicability of *Wilson* is a question of state law to be considered on remand and not by us at this juncture.[2]

Fleming has exclusively relied on a state law retaliation claim without reference to the collective bargaining agreement. We conclude that this claim is not so "inextricably intertwined with consideration of the terms of the labor contract" that this claim is preempted under § 301. *Lueck*, 471 U.S. at 213. This state law claim "can be resolved without interpreting the agreement itself. . . ." *Lingle*, 108 S. Ct. at 1883.

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[2] *Wilson* does observe that claims arising under HCRA, like Title VII claims, are "directed toward enforcement of statutory rights, not contractual rights arising from the collective bargaining agreement." 162 Mich. App. 638, 413 N.W.2d at 81.

Accordingly,we conclude that the district court erred in finding § 301 preemption with regard to Fleming's retaliatory discharge claim.

The Handicap Discrimination Claims

Smolarek and Fleming make the following argument against preemption of their handicap discrimination (HCRA) claims: The rights created by HCRA are in addition to and independent of any rights created by the UAW-Chrysler collective bargaining agreement. They argue that these rights exist regardless of the terms of the collective bargaining agreement and apply equally to union and nonunion employees. Furthermore, they assert that the individual rights established by HCRA are the type of "nonnegotiable" rights that *Lueck* exempted from § 301 preemption and that cannot be bargained away by a collective bargaining unit. In summary, plaintiffs contend that success on the HCRA claim is not contingent on showing that any provision of the collective bargaining agreement was breached; therefore, the federal policy concern regarding interpretive uniformity is not implicated in these cases as set out in *Lingle*.

Chrysler counters these arguments by asserting that in these particular cases, evaluation of plaintiffs' HCRA claims will require consideration of collective bargaining agreement terms. The HCRA provisions applicable to Smolarek's and Fleming's claims require that an employer not "[d]ischarge or otherwise discriminate against an individual with respect to . . . the *terms, conditions, or privileges of employment*," or "[l]imit, segregate, or classify an employee . . . in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." M.C.L. § 37.1202(1)(b), (c) (emphasis supplied). Thus, Chrysler asserts that, in the case of a union employee, the HCRA itself requires reference to the "terms, conditions,

and privileges of employment"—matters defined by the collective bargaining agreement. Finally, Chrysler and amicus curiae, Michigan Manufacturers Association, argue that to allow union employees to pursue this type of HCRA claim could disrupt and/or by-pass the collective bargaining process and grievance procedures.

The Supreme Court in *Lingle* approved, in dicta, the Seventh Circuit's recognition that " '§ 301 does not preempt state antidiscrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge.' " 108 S. Ct. at 1885 (quoting *Lingle*, 823 F.2d at 1046 n.17). The Court went on to note that "the mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Id.*, 108 S. Ct. at 1885. Chrysler, however, seeks to distinguish HCRA from other state anti-discrimination statutes in that HCRA expressly recognizes that some handicaps are related to job performance and does not purport to protect persons with those handicaps. *See Carr v. General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686, *amended by* 426 Mich. 1231, 393 N.W.2d 873 (1986) (holding that a plaintiff who concededly cannot perform the duties of a particular job and who claims that his employer must accommodate him does not state a claim under HCRA).

(1) *Smolarek's HCRA Claim*

On appeal from the district court's order denying his motion for remand, Smolarek specifically argues that Chrysler violated its duties under HCRA by refusing to return him "to his former position or another position consistent with his medical restrictions and has maintained [him] instead on a disability lay off indefinitely." Chrysler responds that this

state-law claim is "substantially dependent" on interpretation of the collective bargaining agreement's provisions regarding an employee's right to reinstatement following disability leave and characterizes Smolarek's claim as asserting a breach of ¶ 53 of the collective bargaining agreement, entitled "Reinstatement after Disability."

Under HCRA, an employee has the initial burden of proving that the employer violated the Act. *Gloss v. General Motors Corp.*, 138 Mich. App. 281, 360 N.W.2d 596, 598 (1984). Smolarek might carry this burden by demonstrating that Chrysler had refused to reinstate him following his disability leave because of his seizure disorder which he first contends does not prevent or disqualify him from working at his former position. *Id.* at 598, 599. The fact that the collective bargaining agreement contains a provision regarding reinstatement does not compel a finding of § 301 preemption. "The mere fact that a broad contractual protection against discriminatory . . . discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Lingle*, 108 S. Ct. at 1885, *quoted in Ackerman v. Western Elec. Co.*, 860 F.2d 1514, 1517 (9th Cir. 1988). Even if Smolarek may have been able to charge Chrysler under these circumstances with a violation of the collective bargaining agreement, he did not choose to do so and this does not mean that § 301, even if applicable but not utilized by plaintiff, preempts the claim. *See Catepillar*, 482 U.S. at 396. This is not a case in which the duty claimed to have been breached (*i.e.*, the duty not to discriminate) arises solely from the collective bargaining agreement. *Cf. International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987) (duty to provide safe workplace derived solely from collective bargaining agreement). Nor is this a case in which evaluation of Chrysler's prima facie liability will necessarily require determination of whether the collective bargaining agreement has been breached. *Cf. Lueck*, 471 U.S. 202.

Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap. The assertion of a defense requiring application of federal law, however, does not support removal to federal court:

> It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. *But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule*—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Caterpillar, 482 U.S. at 398-99 (emphasis added).

Chrysler and Judge Kennedy, in her separate opinion, seem to take the position that since plaintiffs may not be able to prevail on their separate HCRA claim under Michigan law to the extent they seek accommodation for their medical restrictions, *see Carr v. General Motors* and its progeny, then they must therefore be seeking a contract remedy. At oral argument, counsel for plaintiffs expressly disclaimed that they seek any collective bargaining agreement remedy, and we believe their respective complaints support this proposition. In any event, under our ruling, they are limited to pursuit of remedies sought outside the collective bargaining agreement context.

We find that Smolarek's complaint pleaded a cause of action based solely on Michigan's HCRA, a statute that *Lingle* suggests has not been completely preempted by § 301.

Accordingly, we conclude that the district court erred in denying Smolarek's motion for remand to state court.

Smolarek's complaint makes reference to his reporting to work "to his former position," and that "defendant has refused to return plaintiff to his former position" in violation of HCRA. It would therefore be necessary for plaintiff to establish under this allegation that Chrysler violated its HCRA duty, independent of the collective bargaining agreement, not to deprive him of his former job status "because of a handicap that is unrelated to the individual's [Smolarek's] ability to perform the duties of a particular job or position," which he had performed for many years satisfactorily. *See* MCLA § 37.1202(1)(a). Only if found not capable of working at this former job would the court be concerned with Smolarek's alternative contention that he be placed in "another position consistent with his medical restrictions." Complaint, paragraph 16. That Chrysler may defend this latter alternative claim by reference to its responsibilities under the collective bargaining agreement in respect to reasonable accommodation of Smolarek's "medical restrictions" is, in our view, no basis to hold that § 301 preemption is mandated under these circumstances. *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, does not direct otherwise. In footnote 5 of that decision, the Court stated "Hechler argued below simply that the Union's duty of care arose from and was determined by the collective-bargaining agreement . . . ." *Id.*, 481 U.S. at 863 n.5. Smolarek makes no such waiver or abandonment of his theory and assertion of rights under Michigan's HCRA. *Compare Hechler*, 481 U.S. 862, 864 n.5, stating: ("[w]e decline to rule on the impact of *hypothetical*-state law when the relevance of such law was neither presented to or passed upon by the courts below, nor presented to us in the response to the petition for certiorari") (emphasis added).

As the Supreme Court noted in *Caterpillar*, although the state court may need to determine whether § 301 preempts

Smolarek's claim in light of Chrysler's defense based on the collective bargaining agreement, this court need not consider that issue.[3] 482 U.S. at 398 n.13. It is sufficient that we find that Smolarek's well-pleaded complaint did not arise under federal law or under the collective bargaining agreement, and was not unextricably intertwined with the latter.

(2) *Fleming's HCRA Claim*

In contrast to Smolarek's appeal from an order denying remand, Fleming appeals directly from the district court's decision finding § 301 preemption of Fleming's HCRA and retaliatory discharge claims. Therefore, we must consider the preemption issue, whether raised in Fleming's complaint or by Chrysler's defenses.

Fleming asserted in his complaint that Chrysler violated HCRA by failing to provide him with work consistent with his medical restrictions and by effectually terminating him because of his handicap. Chrysler may rely upon the collective bargaining agreement or the Michigan *Carr* rule that it is not called upon to accommodate Fleming if his handicap precludes him from working. *See also DesJardins v. The Budd Co.*, No. 98092, slip op. (Mich. App. Oct. 25, 1988) (unpublished opinion). To establish prima facie liability under the HCRA, he must demonstrate (1) that Chrysler took adverse employment actions against him and (2) that the actions were motivated by his handicap. As in *Lingle*, these are "purely factual questions" relating to the conduct and motivation of the employer. "Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882.

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[3]Our conclusion that Fleming's HCRA claim is not preempted by § 301, *infra*, however, suggests, but does not compel, the conclusion that a state court considering the issue in Smolarek's case might reach.

To defend against the HCRA charge, Chrysler must show that its actions were motivated by some factor other than Fleming's handicap. We recognize that Chrysler is likely to assert as its defense to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Fleming because of his handicap or rather solely because Chrysler felt bound by the union agreement to take the actions or for some other legitimate reason. It is *not* necessary to decide at the outset whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation? Under *Lingle*, therefore, Fleming's HCRA claim is sufficiently "independent" of the collective bargaining agreement to escape § 301 preemption, for "resolution of the state-law claim does not *require* construing the collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted). Accordingly, we conclude under our understanding of *Lingle* that the district court erred in finding Fleming's HCRA claim preempted by § 301.[4]

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[4]This conclusion is not inconsistent with our decision in *Maynard* v. *Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985). There we found that an employee's claim for damages against his union for breach of the union's duty of fair representation, brought pursuant to a provision of Michigan's HCRA, was preempted by § 301. The holding in *Maynard* was based on the fact that the HCRA fair representation provision "created no new rights for an employee and imposed no duty on a union not already clearly present under existing federal labor law." *Id.* at 735. Unlike the fair representation duty considered in *Maynard*, however, the duty not to discriminate based on handicap is not a duty already existing in the federal labor law. Therefore, the concerns regarding interpretative consistency that *Maynard* raised are not present in the instant appeal. *McCall v. Chesapeake & Ohio Railway Co.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 109 S.Ct. 196 (1988), did not involve the question of § 301 preemption.

(3) *Other Case Law Precedent*

We decided only recently a comparable case involving a claim under the Michigan HCRA and a defendant automobile maker to reverse a district court judgment of § 301 preemption and direct that plaintiff employee's claim be remanded to state court. *DeRoseau v. Ford Motor Co.*, Nos. 87-1959, 88-1153, slip op. (6th Cir. Jan. 20, 1989). This result obtained despite the existence of potential collective bargaining agreement remedies. Holding *Lingle* determinative, another court reached the same result under a California handicap discrimination statute. *Ackerman v. Western Elec. Co., Inc.*, 860 F.2d 1514 (9th Cir. 1988). The same result was indicated as to a similar Oregon law in *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988).[5] Other federal district courts in Michigan have reached the same result we have indicated here on the question of whether § 301 or fed-

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[5]*Ackerman* did discuss the circumstance that under the California laws the employer might be directed to accommodate the claimant's handicap. The attempted distinction drawn between the statute and the Michigan law on accommodation is, in our view, immaterial. The employer's defense in *Ackerman* was the CBA provision "which broadly prohibits discrimination on the basis of race, color, religion, sex, age ... or because of handicap," and that interpretation and enforcement of that CBA clause was "inextricably intertwined" with the asserted state law handicap claim. *Id.* at 1517. This is the same argument made by Chrysler. *Ackerman* points out that it was a matter of affirmative defense to show whether the employee could perform the job duties "in a manner which does not endanger his or her health and safety or the health and safety of others." *Id.* at 1518. Chrysler, in the instant case, may raise a similar affirmative defense in state court under the Michigan statutory scheme. *Miller* was formulated before *Lingle*, and refers to *Lingle* only in n.6 as confirming "the approach we have taken," and reaffirming "the holding of *Allis-Chalmers*." 850 F.2d at 551. Oregon's HCRA "declared discrimination based on physical handicap an unlawful employment practice" regardless of whether a CBA contained similar provision, as does the Michigan law. *Id.* at 550. *Miller* distinguished the district court's decision in *Fleming* reported at 659 F. Supp. 392 (E.D. Mich. 1987).

eral labor law preempts a state handicap claim. *See Kazor v. General Motors*, 585 F. Supp. 621 (E.D. Mich. 1984); *Turk v. General Motors*, 637 F. Supp. 739 (E.D. Mich. 1986); *Nolte v. Blue Cross/Blue Shield of Mich.*, 651 F. Supp. 576 (E.D. Mich. 1986) (holding *Stephens v. Norfolk & Western Ry.*, 792 F.2d 576 (6th Cir. 1986) and *Maynard v. Revere Cooper Prod.*, 773 F.2d 733 (6th Cir. 1985) inapposite); *Twombley v. Ford Motor Co.*, 666 F. Supp. 972 (E.D. Mich. 1987). These cases were decided before *Lingle* and *Caterpillar*. For cases in jurisdictions other than Michigan, see *Austin v. Northeast Tel. & Tel.*, 644 F. Supp. 763 (D. Mass. 1986) and *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1344 (S.D. Tex. 1987). *See also DeSoto v. Yellow Freight Systems*, 861 F.2d 536 (9th Cir. 1988) (reversing a prior decision of preemption under § 301 in light of *Lingle*).

In sum, based primarily upon *Lingle* and upon the other precedent discussed, we hold that because resolution of neither Fleming's retaliatory discharge claim nor his handicap discrimination claim would necessitate interpretation of a collective bargaining agreement, those claims are not preempted by § 301. The judgment of the district court in Fleming's case is accordingly REVERSED, and the matter REMANDED for further proceedings. We further find that because Smolarek's complaint asserted solely a violation of Michigan's HCRA and presented no question of federal law, removal to federal court was improper in this case, and the district court erred in denying Smolarek's motion to remand. The order of the district court denying remand is REVERSED, and the case is ordered REMANDED to Michigan state court.

KENNEDY, Circuit Judge, concurring in part and dissenting in part. I concur with the majority that Fleming's retaliatory discharge claim is not preempted by § 301 because resolution of that claim does not require interpretation of the collective bargaining agreement; reversal of the District Court's judgment on the issue is therefore appropriate. I respectfully dissent, however, from the majority's failure to hold that certain aspects of plaintiffs' claims alleged to be under the Michigan Handicappers' Civil Rights Act (HCRA) *are* preempted by § 301. On the basis of the pleadings, as well as looking beyond the pleadings, the standard followed in *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 481 U.S. 851 (1987), I would hold that Smolarek's claim is preempted to the extent that he claims a right to reinstatement to a position other than his former job; and that Fleming's claim is preempted to the extent that he claims a right beyond adaptive aids or devices to enable him to perform his former job. I would therefore find that removal jurisdiction exists based upon a federal question; I would AFFIRM the District Court's order denying Smolarek's motion to remand to Michigan state court, and would AFFIRM the District Court's grant of summary judgment to Chrysler with respect to the preempted aspects of Fleming's HCRA claim. I would REMAND the non-preempted portion of plaintiffs' claims to District Court to exercise its discretion whether to retain the remaining pendent state law claims or to remand the pendent claims to the state court.

I. The Standard for Preemption

I agree with the majority on the applicable standard to determine preemption under § 301. State law claims are preempted unless the state law "confers non-negotiable state-law rights . . . *independent* of any right established by contract, or, instead, whether evaluation of the [state-law] claim is *inextricably intertwined* with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S.

202, 213 (1985) (emphasis added). *See Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1882 (1988) (state-law remedy is independent if "resolution of the state-law claim does not require construing the collective bargaining agreement"). I disagree, however, on the majority's application of that standard to the plaintiffs' claims.

II. The Pleadings

In general, the question of whether removal jurisdiction exists based upon a federal question is answered by reviewing the complaint as of the time of removal. *See O'Halloran v. University of Washington*, 856 F.2d 1375, 1379 (9th Cir. 1988); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979); 14A Wright, Miller, & Cooper, *Federal Practice and Procedure*, § 3721, at 213 & n.79 (and cases cited therein).[1] The majority notes that plaintiffs' counsel expressly disclaimed any collective bargaining remedy at oral argument, and believes that plaintiffs' complaints support the disclaimer. *See* Majority Opinion at 13.

With respect to plaintiffs' disclaimer, removal jurisdiction is not tested at the time of oral argument; rather, the Court must look to the face of the complaint *at the time of removal*. There is no indication in the record that plaintiffs attempted to amend their complaint at that time, and they may not effectively make such an amendment upon appellate review. The complaints and the substance of plaintiffs' claims do present a § 301 federal question.

At the time of removal, Smolarek claimed a right to reinstatement to "his former position or *another* position consistent with his medical restrictions." Smolarek's Complaint, ¶ 16, Jt App 5-6 (emphasis added). To the extent that Smo-

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[1]For the exception to the general rule, *see Libhart*, 592 F.2d at 1066 (federal district court's judgment may be upheld even if no removal jurisdiction if case was tried on the merits).

larek asks for reinstatement to *another* position, his claim is clearly preempted. There is no right independent of the collective bargaining agreement to be reinstated to another job consistent with one's medical disability under the HCRA. *Carr v. General Motors Corp.*, 425 Mich. 313 (1986); *Desjardins v. The Budd Co.*, C.A. No. 98092 (Mich. App. 1988) (unpublished opinion).

Chrysler contends that not only is there no duty under HCRA to reinstate Smolarek to a *another* position, there is also no duty to reinstate him to his *former* position even if its reason for failing to do so was unrelated to his ability to perform the requirements of that job. The basis of this contention is that Chrysler had already accommodated Smolarek's epilepsy for many years under the collective bargaining agreement, and that he could not have performed the *original* requirements of his job as a tool and die maker without this contractual accommodation in the collective bargaining agreement.

This is a difficult question to answer. The Michigan Supreme Court has made it clear that an employer has no duty to accommodate an employee's medical restrictions that are related to his ability to perform the duties of a particular job. *Carr*, 425 Mich. 313. The HCRA prohibits discharge only for "a handicap that is *unrelated* to the individual's ability to perform the duties of a particular job or position." M.C.L. § 37.1202 (emphasis added). However, the Michigan courts have not addressed the precise question of whether the HCRA refers to an individual's ability to perform the job as originally defined, or to perform the standards of the job as *redefined* or "carved-out" for a particular employee.

The Michigan courts might hold that the proper reference point for Smolarek's ability to perform his former job is the "carved-out" position. Assuming that the Michigan courts so hold, Smolarek would have a claim under the HCRA if he was able to perform the "carved-out" job from which he

was discharged, and the discharge was due to an unfounded fear of epileptics. I leave to another day whether the right under the HCRA would be parallel to, or, as I believe, "inextricably intertwined" with, the terms of the collective bargaining agreement. Resolution of this issue may depend on how the right is defined as a matter of state law. I make no attempt to resolve this question today, since it would merely be dicta in a dissent.

The majority fails to note that Fleming's claim is also preempted to the extent that he claims a right to reinstatement to *another* position. Such rights are "inextricably intertwined" with the contract, and must be pursued under § 301. Fleming's complaint states that Chrysler breached its duties under the HCRA by "[f]ailing to suggest and/or implement reasonable accommodations so as to allow Plaintiff to work despite his physical determinable handicap in violation of MCLA 37.1101 *et. seq.*" Fleming's Complaint, Count II ¶ 3(c), Jt App 12. Reviewing the complaint as of the time of removal, it is clear that Fleming was requesting an accommodation that has been held outside of HCRA's scope by *Carr*. This conclusion is also evident in Fleming's deposition testimony, in which he admits that he cannot perform the requirements of his former job without being accommodated. *See* Fleming Deposition, Jt App 177. The only source of Chrysler's duty to make "provisions [for] me to do my job," *id.*, is the collective bargaining agreement. It is, however, possible to construe Fleming's claim as requesting "adaptive aids or devices . . . thereby enabling [him] to perform the specific requirements of [his job as a painter-glazer]." M.C.L. § 37.1202(1)(g). To that extent, his claim would not be preempted, and would be a pendent state-law claim analogous to Smolarek's "pretext" claim.

III. Beyond the Pleadings

Even if this Court were not required to test removal jurisdiction as of the time the removal petition was filed, those

aspects of Smolarek's and Fleming's claims beyond their former positions are preempted under the complete preemption doctrine. As explained by the Supreme Court in *Hechler*, 481 U.S. 851, this Court must look beyond the pleadings to the entire claim, and determine whether or not it is based on the collective bargaining agreement, rather than on non-negotiable rights conferred under the HCRA.

In *Hechler*, the plaintiff argued that her union had breached its duty of care to ensure a safe workplace. She contended that the collective bargaining agreement was not implicated and that she was solely relying on state common law. In finding her claim preempted, the Supreme Court refused to accept her state-law argument on its face. Instead, the Court went beyond the pleadings and ascertained that although the *employer* had such a duty, the union's duty flowed solely from the collective bargaining agreement:

> Respondent's allegations of negligence assume significance if—and only if—the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached. The collective bargaining agreement between the Union and Florida Power . . . contain[s] provisions on safety and working requirements for electrical apprentices on which Hechler could try to base an argument that the Union assumed an implied duty of care. In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union . . . .

481 U.S. at 861-62 (footnote omitted). The plaintiff could not avoid § 301 preemption by simply asserting that she had a state-law tort claim.

As in *Hechler*, Smolarek and Fleming ask us to wear blinders. Plaintiffs conceded during oral argument that their claim to accommodation to *another* position under the HCRA was

eliminated by the Michigan Supreme Court's holding in *Carr*, 425 Mich. 313. They attempted to sidestep this apparent concession, however, through their "floor of rights" theory. Under this theory, they posit that although an employer need not provide for a right to reinstatement following a disability, if it does provide that right—either through the collective bargaining agreement or voluntarily—it must not discriminate in giving that right to all groups. We must, however, examine whether the "floor of rights" in this case derive from non-negotiable rights conferred by the HCRA, or if the genes's is from *negotiable* rights, whether derived from the collective bargaining agreement or voluntary action.

Appellants analogize their "floor of rights" theory to race, sex, and age discrimination cases. The problem with this analogy is that race, sex, and age discrimination are classic examples of "*nonnegotiable* rights . . . independent of any right established by contract." *Allis-Chalmers*, 471 U.S. at 213. These cases fall under the doctrine of complete parallelism, as explained by the Supreme Court in *Lingle*:

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

108 S. Ct. at 1883. In race, sex, and age cases, interpretation of the collective bargaining contract is unnecessary. The same case could be heard in a state tribunal considering the employer's motive for terminating the employee, or by an arbitrator considering whether the employer was justified under a "just cause" collective bargaining provision. The right to be free of race, sex, or age discrimination is independent of any ancillary right contained in a collective bargaining agreement.

Likewise, if an employee is terminated for a handicap *unrelated* to his ability to perform the functions of his job, interpretation of a collective bargaining agreement is unnecessary to his claim. The HCRA has provided a *nonnegotiable* right to be free of this type of discrimination. In contrast, however, the HCRA confers no right of accommodation. Accommodation is therefore a *negotiable* right provided either by contract, here the collective bargaining agreement, or voluntarily. To allow the extension of HCRA's non-discrimination language once negotiable rights are given would impermissibly bootstrap an accommodation requirement into the HCRA. Thus, the "floor of rights" argument simply restates that which is impermissible: "you are not required to give rights, *i.e.*, accommodate employees, but once you do, you cannot discriminate with respect to that discrimination."

Although the majority feels otherwise, plaintiffs' position is not strengthened by the Ninth Circuit's finding that there was no § 301 preemption in *Ackerman v. Western Elec. Co.*, 860 F.2d 1514 (9th cir. 1988), and in *Miller AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988). Those cases found that Ackerman's (*California*) and Miller's (*Oregon*) handicap discrimination claims were not preempted by § 301 because they did not "require interpretation of a collective bargaining agreement." *Ackerman*, 860 F.2d at 1517. The key difference between these cases and the Michigan HCRA, however, is that the Oregon and California statutes *require* accommodation. Thus, accommodation is a *non-negotiable* right under Oregon and California law. Under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement—the right is provided by statute regardless of what the agreement may or may not provide.

Lastly, the majority cites a number of federal district court cases for the proposition that "§ 301 or federal labor law [does not] preempt[ ] a state handicap claim." Majority Opinion

at 17-18. The cited cases neither undermine, nor are they in conflict with, my position. Plaintiffs' claims in those cases were not preempted because they were not dependent on interpreting the collective bargaining agreement. *See, e.g., Turk v. General Motors Corp.*, 637 F. Supp. 739, 740 n.1 (E.D. Mich. 1986) ("plaintiff's claims here do not in any way depend upon an interpretation of the collective bargaining agreement"); *Nolte v. Blue Cross Blue Shield of Michigan*, 651 F. Supp. 576, 577 (plaintiff's HCRA claim not "inextricably intertwined with consideration of the terms of the labor contract"); *Austin v. New England Telephone and Telegraph Co.*, 644 F. Supp. 763, 768 (D. Mass. 1986) ("Here, none of Austin's state claims appear from the complaint to arise as a consequence of rights created in the collective bargaining agreement."). As the Court explains in *Nolte*, the analysis of whether rights are inextricably intertwined with the terms of the collective bargaining agreement "saves state civil rights laws, like [HCRA], from *wholesale* preemption." 651 F. Supp. at 577 (emphasis added).

Unlike the cases cited by the majority, Smolarek's and Fleming's claims to accommodation to other positions, regardless of the terminology used, derive solely from negotiable rights under the collective bargaining agreement. Such rights are not "independent of any right established by contract, [and are] inextricably intertwined with consideration of the terms of the labor contract," *Allis- Chalmers*, 471 U.S. at 213. The claims are therefore preempted under § 301.

IV.

Smolarek & Fleming v. Chrysler sets an overbroad precedent against finding § 301 preemption when the collective bargaining agreement is clearly implicated. The danger is clear:

> [A]s we explained in *Lueck*, "[t]he need to preserve the effectiveness of arbitration was one of the

> central reasons that underlay the Court's holding in *Lucas Flour*." 471 U.S., at 219. "A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." [citations omitted]. Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements.

Lingle, 108 S. Ct. at 1884 (footnote omitted).

I would AFFIRM the District Courts' finding of preemption to the extent that plaintiffs request reinstatement to other positions, and would REMAND the cases to the District Court on the issue of whether to retain the remaining pendent state-law claims.

Appendix B

Nos. 86-2074/87-1387

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANLEY SMOLAREK (86-2074),
RALPH FLEMING (87-1387),
Plaintiffs-Appellants,

ORDER

v.

CHRYSLER CORPORATION, ETC., ET AL.,
Defendants-Appellees

BEFORE: ENGEL, Chief Judge, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green, *Clerk*

Appendix C

Nos. 86-2074/87-1387

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANLEY SMOLAREK,
Plaintiff-Appellant,
(86-2074)

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

RALPH FLEMING,
Plaintiff-Appellant,
(87-1387)

v.

CHRYSLER CORPORATION, a Delaware Corporation; LOUIS EBALDI and LYNDON VERLYNDON, jointly and severally,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 3, 1988

Before: WELLFORD and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

Appendix C

Smolarek, et al. v. *Chrysler Corp.* *Nos. 86-2074/87-1387*

PER CURIAM. These combined cases present close and difficult questions regarding whether § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts plaintiffs' actions claiming violations of Michigan's Handicappers' Civil Rights Act, M.C.L. § 37.1101 *et seq.* (HCRA), and retaliatory discharge in violation of public policy relating to the filing of workers' compensation claims. In each case the district court found plaintiff's state cause of action preempted by § 301 and dismissed the suit for failure to exhaust remedies. The Supreme Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, _____ U.S. _____, 108 S. Ct. 1877 (1988), holding that an action under Illinois law for the tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301, guides our decision in these cases.

SMOLAREK

Smolarek was employed by Chrysler from 1953 until his lay off in 1984, and was a member of the UAW.[1] Since an injury in 1955, Smolarek has suffered from a seizure disorder, which normally has been controlled by medications. In October 1984, he suffered a seizure at work and was absent from work for the following two weeks. When he returned to work, he was informed that no jobs consistent with the medical restrictions he had worked with since 1955 were available. In 1985 Smolarek again attempted to return to work and was told no work was available within his restrictions. Plaintiff alleges that at this time his foreman made the comment, "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack."

In April 1986, Smolarek filed a two count complaint in Michigan state court alleging discrimination under the HCRA

[1] The UAW has filed an amicus curiae brief in the *Smolarek* appeal arguing for reversal of the district court's judgment.

and workers' compensation retaliation. He claimed that Chrysler discriminated against him by refusing to return him to his former position based on a handicap unrelated to his ability to perform his job duties, and that Chrysler also refused to reinstate him based on its fear that he might injure himself during a seizure on the job and file a workers' compensation claim. Smolarek did not allege any violation of the collective bargaining agreement between the UAW and Chrysler.

Chrysler removed the case to federal district court claiming federal question jurisdiction. Smolarek filed a motion to remand, which the district court denied on the grounds that § 301 preempted Smolarek's claims. The district court then dismissed Smolarek's action because he had failed to exhaust his intra-union remedies before filing a § 301 action. Smolarek now appeals the district court's denial of his motion to remand solely on the handicap discrimination issue.

FLEMING

Chrysler hired Fleming, also a UAW member, in 1976 as a painter-glazer. In August 1984, Fleming was injured while leaving the Chrysler plant where he worked, and as a result suffered some loss of balance, severe headaches, muscle spasms in his back, and vomiting. Fleming continued to work with some medical restrictions on the types of tasks he could perform. Fleming claims that following his injury he was given job assignments inconsistent with his limitations. Fleming further contends that this "harassment" increased when he expressed his intent to file a workers' compensation claim. In October 1984, Fleming was laid off indefinitely. Chrysler claims his lay off was due to lack of work, as allowed by the collective bargaining agreement. Fleming claims that, while technically on lay off, he was told he was being dismissed.

In December 1984, Fleming grieved his lay off. This grievance was pursued to the third step of a four-step grievance procedure before Fleming voluntarily terminated hs employment in May 1986 by relinquishing his recall rights as part of a settlement of his workers' compensation claim filed in February 1985.

Fleming filed a complaint in state court in July 1985, alleging violation of HCRA, discharge in retaliation for expressed intent to file a workers' compensation claim, breach of implied duty of good faith and fair dealing, and intentional interference with his quiet and peaceful pursuit of a lawful occupation. In August 1985, Chrysler removed the suit to federal district court. In October 1985, the district court denied Fleming's motion to remand on the grounds that the latter two counts of Fleming's complaint conferred original jurisdiction on the federal court.

Chrysler then filed a motion for summary judgment arguing that Fleming's claims were preeempted by §301. Finding that all of Fleming's claims were preempted, the district court granted the motion and dismissed the case. Fleming appeals this dismissal only with regard to the HCRA and retaliatory discharge claims.

Removal and § 301 Preemption

Ordinarily, the question of removability to federal court under 28 U.S.C. § 1441 turns upon application of the "well-pleaded complaint rule." Federal jurisdiction exists only when a plaintiff's properly pleaded complaint presents a federal question on its face. *Caterpillar, Inc. v. Williams,* 107 S. Ct. 2425, 2429 (1987). In the context of employment-related actions, however, a claim purportedly based solely on state law may be removable because § 301 of the LMRA has preempted that area of state law. In other words, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* at 2430. Thus, in the cases

we now consider, the issues of federal preemption and removability largely merge; we must focus on whether plaintiffs' state-law claims are preempted by § 301 so as to place them within the scope of the "complete preemption" corollary to the well-pleaded complaint rule.

In a series of cases, the Supreme Court has made clear that § 301 of the LMRA preempts any state-law claim arising from a breach of a collective bargaining agreement. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *Local 174, Teamsters, Chauffeurs, Warehousemen, & Helpers of America v. Lucas Flour Co.,* 369 U.S. 95 (1962); *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957); *see also Lingle v. Norge Division of Magic Chef, Inc.,* 108 S. Ct. 1877 (1988). The purpose of this rule is to require that all claims raising issues of labor contract interpretation be decided according to the precepts of federal labor law in order to prevent inconsistent interpretations of the substantive provisions of collective bargaining agreements. *Lucas Flour,* 369 U.S. at 103.

> Thus, *Lueck* faithfully applied the principle of § 301 preemption developed in *Lucas Flour,* if the resolution of a state-law claim depends upoon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.

Lingle, 108 S. Ct. at 1881 (footnotes omitted).

In *Allis-Chalmers v. Lueck,* the Court expanded the preemptive reach of § 301 to state-law tort claims. In *Lueck* the Court considered whether a state-law cause of action for bad faith handling of an insurance claim was preempterd because the insurance plan provisions were included in a collective bargaining

agreement. The Court found the state claim was preempted because an essential element of the tort (*i.e.*, bad faith handling) required interpretation of the labor agreement regarding whether the plaintiff was due payments. Because the duty claimed to have been breached "derive[d] from the rights and obligations established by the contract," the Court reasoned that "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 217, 218.

Although the Court limited its holding in *Lueck* to the specific facts of that case and made clear that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement . . . necessarily is pre-empted by § 301," *id.* at 220, the Court did attempt to define the preemptive scope of § 301:

> Our analysis must focus, then, on whether the [state-law cause of action] confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state-law] claim is inextricably intertwined with consideration of the terms of the labor contract.

Id. at 213.

In its recent decision addressing asserted § 301 preemption of state-law claims, the Supreme Court has attempted to clarify its language in *Lueck* regarding what kind of "independence" of state-law actions from collective bargaining agreements permits a finding of non-preemption. In *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), the Court held that a unionized employee's state-law action based on Illinois' tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301 because "the state-law remedy . . . is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: *resolution of the state-law claim does not require construing the*

collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted). In so concluding, the Court rejected the contentions of the employer that the retaliatory discharge action was not independent because resolution of the state-law claim would implicate the same factual analysis as would a grievance brought under the CBA's "just cause" provision. *Id.* Thus, *Lingle* stands as the Court's latest word on § 301's preemptive scope and, as such, will guide our decision in these cases.

The Workers' Compensation/Retaliatory Discharge Claim

Fleming filed a state-law suit claiming that he was effectively discharged (technically, he was laid off) because of his expressed intention to file a workers' compensation claim. The district court found that Fleming's state-law claim was preempted by § 301, and Chrysler argues that this decision was correct because the retaliatory discharge claim is inextricably intertwined with the terms of the collective bargaining agreement.

Fleming's claim is essentially the same as the claim that the Court addressed in *Lingle.* In order for a plaintiff to show retaliatory discharge under Michigan law, he must demonstrate that he was discharged by his employer in retaliation for the filing of a lawful claim for workers' compensation. *See Sventko v. Kroger Co.,* 69 Mich. App. 644, 245 N.W.2d 151, 154 (1976). As the Court reasoned in *Lingle:* "Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882. Consequently, here, as in *Lingle,* the state-law tort of retaliatory discharge creates rights independent of those established by the collective bargaining agreement and hence is not preempted by § 301. Accordingly, we conclude that the district court erred in finding § 301 preemption with regard to Fleming's retaliatory discharge claim.

The Handicap Discrimination Claims

Smolarek and Fleming make the following argument against preemption of their handicap discrimination (HCRA) claims: The rights created by HCRA are in addition to and independent of any rights created by the UAW-Chrysler collective bargaining agreement. They argue that these rights exist regardless of the terms of the collective bargaining agreement and apply equally to union and nonunion employees. Furthermore, they assert that the individual rights established by HCRA are the type of "nonnegotiable" rights that *Lueck* exempted from § 301 preemption and that cannot be bargained away by a collective bargaining unit. In summary, plaintiffs contend that success on the HCRA claim is not contingent on showing that any provision of the collective bargaining agreement was breached; therefore, the federal policy concern regarding interpretive uniformity is not implicated in these cases as set out in *Lingle*.

Chrysler counters these arguments by asserting that in these particular cases, evaluation of plaintiffs' HCRA claims will require consideration of collective bargaining agreement terms. The HCRA provisions applicable to Smolarek's and Fleming's claims require that an employer not "[d]ischarge or otherwise discriminate against an individual with respect to . . . the *terms, conditions, or privileges of employment,*" or "[l]imit, segregate, or classify an employee . . . in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." M.C.L. § 37.1202(1)(b), (c) (emphasis supplied). Thus, Chrysler asserts that, in the case of a union employee, the HCRA itself requires reference to the "terms, conditions, and privileges of employment" — matters defined by the collective bargaining agreement. Finally, Chrysler argues that to allow union employees to pursue this type of

HCRA claim could disrupt and/or bypass the collective bargaining process and grievance procedures.

The Supreme Court in *Lingle* approved, in dicta, the Seventh Circuit's recognition that "§ 301 does not preempt state anti-discrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge." 108 S. Ct. at 1885 (quoting *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1046 n.17 (7th Cir. 1987)). The Court went on to note that "the mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Id.* Chrysler, however, seeks to distinguish HCRA from other state anti-discrimination statutes in that HCRA expressly recognizes that some handicaps are related to job performance and does not purport to protect persons with those handicaps. *See Carr v. General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686, *amended by* 426 Mich. 1231, 393 N.W.2d (1986).

(1) ***Smolarek's HCRA Claim***

On appeal from the district court's order denying his motion for remand, Smolarek specifically argues that Chrysler violated its duties under HCRA by refusing to return him "to his former position or another position consistent with his medical restrictions and has maintained [him] instead on a disability lay off indefinitely." Chrysler responds that this state-law claim is "substantially dependent" on interpretation of the collective bargaining agreement's provisions regarding an employee's right to reinstatement following disability leave and characterizes Smolarek's claim as asserting a breach of ¶ 53 of the collective bargaining agreement, entitled "Reinstatement after Disability."

Under HCRA, an employee has the initial burden of proving that the employer violated the Act. *Gloss v. General Motors Corp.*, 138 Mich. App. 281, 360 N.W.2d 596, 598 (1984). Smolarek might carry this burden by demonstrating that Chrysler had refused to reinstate him following his disability leave *because of* his seizure disorder. *See id.* The fact that the collective bargaining agreement contains a provision regarding reinstatement does not compel a finding of § 301 preemption. This is not a case in which the duty claimed to have been breached (*i.e.*, the duty not to discriminate) arises solely from the collective bargaining agreement. *Cf. International Brotherhood of Electrical Workers v. Hechler,* 107 S. Ct. 2161 (1987) (union's duty to provide safe workplace derived solely from collective bargaining agreement). Nor is this a case in which evaluation of Chrysler's prima facie liability will require determination of whether the collective bargaining agreement has been breached. *Cf. Lueck,* 471 U.S. 202.

Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap. The assertion of a defense requiring application of federal law, however, does not support removal to federal court:

> It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. ***But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule*** — that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Caterpillar, 107 S. Ct. at 2433 (emphasis added).

We find that Smolarek's complaint pleaded a cause of action based solely on Michigan's HCRA, a statute that *Lingle* suggests has not been completely preempted by § 301. Accordingly, we conclude that the district court erred in denying Smolarek's motion for remand to state court. As the Supreme Court noted in *Caterpillar,* although the state court may need to determine whether § 301 preempts Smolarek's claim in light of Chrysler's defense based on the collective bargaining agreement, this court need not consider that issue.[2] *Id.* at 2433 n.13. It is sufficient that we find that Smolarek's well-pleaded complaint did not arise under federal law or under the collective bargaining agreement.

(2) *Fleming's HCRA Claim*

In contrast to Smolarek's appeal from an order denying remand, Fleming appeals directly from the district court's decision finding § 301 preemption of Fleming's HCRA and retaliatory discharge claims. Therefore, we must consider the preemption issue, whether raised in Fleming's complaint or by Chrysler's defenses.

Fleming asserted in his complaint that Chrysler violated HCRA by failing to provide him with work consistent with his medical restrictions and by effectually terminating him because of his handicap. To establish prima facie liability under the Act, he must demonstrate (1) that Chrysler took adverse employment actions against him and (2) that the actions were motivated by his handicap. As in *Lingle,* these are "purely factual questions" relating to the conduct and motivation of the employer. "Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882.

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[2] Our conclusion that Fleming's HCRA claim is not preempted by § 301, *infra,* however, suggests, but does not compel, the conclusion that a state court considering the issue in Smolarek's case might reach.

To defend against the HCRA charge, Chrysler must show that its actions were motivated by some factor other than Fleming's handicap. We recognize that Chrysler is likely to assert as its defense to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Smolarek because of his handicap or solely because Chrysler felt bound by the union agreement to take the actions. It is *not* necessary to decide whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation? Under *Lingle*, therefore, Fleming's HCRA claim is sufficiently "independent" of the collective bargaining agreement to escape § 301 preemption, for "resolution of the state-law claim does not *require* construing the collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted). Accordingly, we conclude under our understanding of *Lingle* that the district court erred in finding Fleming's HCRA claim preempted by § 301.[3]

In sum, we hold that because resolution of neither Fleming's retaliatory discharge claim nor his handicap discrimination claim would necessitate interpretation of a collective bargaining agree-

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[3]This conclusion is not inconsistent with our decision in *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985). There we found that an employee's claim for damages against his union for breach of the union's duty of fair representation, brought pursuant to a provision of Michigan's HCRA, was preempted by § 301. The holding in *Maynard* was based on the fact that the HCRA fair representation provision "created no new rights for an employee and imposed no duty on a union not already clearly present under existing federal labor law." *Id.* at 735. Unlike the fair representation duty considered in *Maynard*, however, the duty not to discriminate based on handicap is not a duty already existing in the federal labor law. Therefore, the concerns regarding interpretative consistency that *Maynard* raised are not present in the instant appeal.

ment, those claims are not preempted by § 301. The judgment of the district court in Fleming's case is accordingly **REVERSED,** and the matter **REMANDED** for further proceedings. We further find that because Smolarek's complaint asserted solely a violation of Michigan's HCRA and presented no question of federal law, removal to federal court was improper in this case, and the district court erred in denying Smolarek's motion to remand. The order of the district court denying remand is **REVERSED,** and the case is ordered **REMANDED** to Michigan state court.

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STANLEY SMOLAREK
Plaintiff

v.

CHRYSLER CORPORATION,
Defendant

Civil Action
No. 86-71763

HON. JULIAN ABELE
COOK, JR.

ORDER

The Plaintiff, Stanley Smolarek ("Smolarek"), filed a two count Complaint against the Defendant, Chrysler Corporation ("Chrysler"), in a state court. Count I alleged a violation of Michigan's Handicappers' Civil Rights Act. 37 MCLA § 37.101 *et seq.* Count II alleged a violation of Michigan's public policy against the retaliatory firing of Smolarek for his earlier filing of a worker's compensation claim against Chrysler. Both counts arose out of Chrysler's alleged refusal to return Smolarek to work after he had suffered a seizure on the job.

Chrysler removed the matter from the state court, claiming that this Court has original jurisdiction pursuant to 29 U.S.C. § 185 and 28 U.S.C. §§ 1331 and 1337. Thus, according to Chrysler, removal was proper under 28 U.S.C § 1441(b).

Smolarek disagrees with Chrysler and now seeks a remand of the matter to state court. Smolarek contends that his case will not involve an application or interpretation of the collective bargaining agreement since he does not seek to enforce any right that may arise under that contract. As a result, he argues that his state actions are not preempted by the National Labor Relations Act, 29 U.S.C. § 151.

In response, Chrysler contends that Smolarek's rights to reinstatement from disability are derived exclusively from his collective bargaining agreement, and as such, his claims are preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Thus, Chrysler asserts that any other conclusion would allow Smolarek to undermine federal labor policy by purposefully failing to plead a necessary federal question.

The question presented for consideration by this Court is whether Smolarek's causes of action are preempted by § 301 of the LMRA. The seminal case on this question is *Allis-Chalmers v. Lueck*, 105 S.Ct. 1904 (1985). According to *Lueck*, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law." *Id.* at 1911. Instead, the preemptive effect of § 301 extends only to "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement." 105 S.Ct. at 1911. "Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements." *Id.* at 1912. Conversely, state-law rights and obligations that are independent of the labor contract, and, therefore, proscribe non-negotiable conduct or establish non-negotiable rights or obligations are not preempted by § 301. Consequently, under *Lueck*, the question becomes whether the state law rights and obligations, which have been asserted by Smolarek, are non-negotiable state law rights and obligations that are inextricably intertwined with consideration of the terms of the labor contract. *See id.* at 1912.

Chrysler believes that Smolarek's cases of action are inextricably intertwined with his labor contact. In support of its position, Chrysler contends that this case is analogous to several other cases. For example, Chrysler believes that the instant case is analogous to *Maynard v. Revere Copper Products, Inc.*, 773 F.2d

733 (6th Cir. 1985). In *Maynard,* the Sixth Circuit Court of Appeals held that a claim of unfair representation against a union and an employer under § 37.1204(d) of Michigan's Handicappers' Civil Rights Act was preempted by § 301 because "[t]he duty of fair representation is a federally created statutory duty and federal law 'governs' a cause of action for breach of that duty." *Maynard,* 773 F.2d at 735. However, Smolarek has not alleged a breach of the duty of fair representation. Hence, *Maynard* is not analogous.

Chrysler also believes that *Butynski v. General Motors Corporation,* No. 85-60454-AA (E.D. Mich. March 12, 1986); *Cole v. General Motors Corporation, et al,* No. G83-408CA (W.D. Mich. October 22, 1984); *Curry v. General Motors Corporation,* No. 85-C1938 (E.D. Ill. October 11, 1985); *Jasmund v. Chrysler Corporation, et al,* No. 85-CB-73586-DT (E.D. Mich. November 7, 1985); and *Fleming v. Chrysler Corporation, et al,* No. 85-CV-73803-DT (E.D. Mich. October 7, 1985) are also analagous.

The "well pleaded complaint rule" instructs this Court that Smolark is the master of his complaint and, therefore, he usually determines the law upon which he relies in advancing his causes of action. *Franchise Tax Board v. Construction Laborers Vacation Trust,* _____ U.S. _____, 103 S.Ct. 2841, 2853 (1983). The "artful pleading rule," however, precludes Smolarek from avoiding removal to this Court by inadvertently, mistakenly, or fraudulently failing to plead a federal question. *Schaeffer v. General Motors Corp.,* 586 F. Supp. 870, 872 (E.D. Mich. 1984). Since the "artful pleading" rule is a necessary collorary of the "well pleaded complaint rule," *Franchise Tax Board,* _____ U.S. _____, 103 S.Ct. at 2853, this Court must determine whether a federal question would necessarily have appeared if Smolarek's complaint had been well pleaded. Without expressing any comment on the analogous nature of Chrysler's persuasive authority, this Court believes that Smolarek's causes of action are preempted by § 301.

Appendix D

In pertinent part, Smolarek asks this Court to impose the following restrictions and obligations upon Chrysler on the basis of the Michigan Handicappers' Civil Rights Act:

> a) refrain from discriminating against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> b) refrain from limiting, segregating, or classifying an employee in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely effect the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> c) refrain from taking discriminatory action against an individual on the basis of physical examinations that are not directly related to the requirements of the specific jobs;
>
> d) accommodate plaintiff's handicap by providing him with work which would fit his particular needs or handicap and otherwise accommodate plaintiff so that he can remain in the active employ of defendant.

Smolarek's Complaint also made the following request on the basis of the Michigan Worker's Disability Compensation Act:

> (a) to [preclude Chrysler] from discriminating or otherwise retaliating against its employees in general and plaintiff in particular in anticipation of such employee making a claim against defendant. . .

Obviously, those duties are based upon the labor contract because they are derived from rights and obligations established by the contract. For example, they depend upon Smolarek's terms, conditions, and privileges of employment that are addressed in the labor contract. They depend upon employment classifications, limitations, and segregations that are covered by the collective

bargaining agreement. They depend upon physical examinations and availability of employment, both of which are dependent upon the collective bargaining agreement. They depend upon the validity of Chrysler's rationale for considering Smolarek unemployable, which also is a right that was established by the collective bargaining agreement.

Because the rights and duties which have been asserted by Smolarek are derived from his collective bargaining contract, any disposition of his causes of action will necessarily involve an interpretation of the labor contract. Consequently, Smolarek's claims are "inextricably intertwined" with that contract. *Lueck*, 105 S.Ct. at 1912. This Court, therefore, holds that § 301 of the LMRA preempts Smolarek's causes of action. Accordingly, Smolarek's Motion to Remand is denied.

IT IS SO ORDERED.

(s) JULIAN ABELE COOK, JR.
United States District Judge

Dated: September ???
Detroit, Michigan

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STANLEY SMOLAREK
Plaintiff,

v.

CHRYSLER CORPORATION,
Defendant.

C.A. No. 86CV71763DT
Honorable Julian Abele Cook, Jr.

ORDER OF DISMISSAL WITH PREJUDICE

At a session of said Court, held in the Federal Building, Detroit, Michigan
ON: October 24, 1986

PRESENT: HONORABLE JULIAN ABELE COOK, JR.
United States District Judge

Upon the reading and filing of the attached stipulation, and the Court being fully advised in the premises,

IT IS ORDERED that Stanley Smolark's action against Chrysler Motors Corporation f/k/a Chrysler Corporation is hereby dismissed with prejudice and without costs or attorney fees because Plaintiff did not exhaust his internal union appeals.

(s) JULIAN ABELE COOK, JR.
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RALPH FLEMING,
Plaintiff.

v.

CHRYSLER CORPORATION, a Delaware corporation LOUIS EBALDI and LYNDON VERLYNDON, Jointly and Severally,
Defendants.

CASE NO. 85-CV-73803-DT

HON. BARBARA K. HACKETT

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is presently before the court on defendant's motion for summary judgment on the remaining counts in plaintiff's complaint. For the reasons set forth below, defendant's motion is granted.

FACTS

Plaintiff was hired by defendant Chrysler Corporation ("Chrysler") in September, 1976. He worked as a painter/glazer at Chrysler until he was laid off on October 19, 1984. Throughout his employment at Chrysler, plaintiff was a member of the International Union, UAW. Defendants Louis Ebaldi and Lyndon Verlyndon were plaintiff's supervisors.

Plaintiff has asserted that he was afflicted with a physical condition that precluded him from performing his assigned duties. He therefore asked that Chrysler make certain provisions for his

physical limitations. Appparently he had been involved on August 31, 1984, in an automobile accident, as a result of which he suffered repeated episodes of vomiting that lasted from two to seven days. He asked UAW officials to discuss with Chrysler the possibility of placing work restrictions on plaintiff's assignments.

On October 19, 1984, plaintiff was placed on indefinite layoff in a reduction in force at Chrysler's Detroit Forge Plant. Plaintiff characterizes his indefinite layoff as a discharge. Defendant maintains, however, that plaintiff retained all of his recall rights under Chrysler's collective bargaining agreement ("CBA") with the UAW, until he signed a release and waiver of seniority on May 15, 1986, pursuant to a settlement of a workers' compensation claim he filed on February 21, 1986.

On July 29, 1985, plaintiff filed the instant lawsuit, alleging that his indefinite layoff and Chrysler's failure to make provisions for his physical condition constituted handicap discrimination, retaliatory discharge, breach of an implied duty of good faith and fair dealing, and intentional interference with his pursuit of his occupation.

Plaintiff initially took his dispute with Chrysler to the UAW, which filed a grievance on his behalf asserting that his layoff was improper. This grievance was processed through the first three steps of the grievance procedure and was pending at the fourth step when plaintiff voluntarily quit his employment. Plaintiff instituted the present action without having exhausted all available union grievance procedures. Chrysler removed plaintiff's suit to this court, alleging that at least some, if not all, of plaintiff's claims constitute claims under § 301 of the Labor Management Relations Act ("LMRA"). Plaintiff's subsequent motion to remand to state court was denied in an order issued by Judge LaPlata on October 5, 1985. Judge LaPlata ruled at that time that plaintiff's claims of breach of an implied duty of good faith and interference with pursuit of his occupation arise under § 301.

Appendix E

DISCUSSION

This court has previously applied the artful pleading rule in similar actions. In *Butynski v. General Motors Corporation,* No. 85-CV-60454-AA (E.D. Mich., March 12, 1986, Joiner, J.) the plaintiff alleged that her complaint referred only to the Michigan Handicappers Civil Rights Act and not to any provision of federal law. She argued that removal was therefore improper. The court disagreed. It held that since plaintiff had raised issues of job assignment and seniority in her complaint - subjects covered by the collective bargaining agreement - plaintiff's suit fell under § 301 of the LMRA. The court refused to allow "artful pleading" to prevent removal of a claim properly covered by the labor statute.

In the present case, although plaintiff fails to refer in his complaint to the CBA between Chrysler and the UAW, the complaint is replete with references to issues covered by the CBA. To the extent that a subject is governed by the CBA, the CBA must necessarily preempt state law, in order to achieve the intent of the LMRA to achieve uniform interpretation of collective bargaining agreements. *Allis-Chalmers Corporation v Lueck,* 105 S.Ct. 1904 (1985).

Recent opinions of the Court of Appeals for the Sixth Circuit confirm prior decisions in this District. In *Stephens v. Norfolk & Western R. Co.,* 792 F.2d 576 (6th Cir. 1986), the Court of Appeals invoked the following test to determine whether a railroad employee, who had been disqualified from work following diagnosis of degenerative disease in his lower back, could bring a cause of action under the Michigan Handicappers Civil Rights Act:

> If the "action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and the [Railway Labor Act]", exclusive jurisdiction of the [National Railroad Adjustment Board] preempts the action.

792 F.2d 576 at 580. The court rejected Stephens' claim under the Handicappers Act, having found that the collective bargaining agreement covered aspects of the work relationship between the railroad and its employees, including the employer's right to set physical qualifications for its employees.

In the present case, a supplement to the CBA between Chrysler and the UAW, dated November 5, 1976, specifically addresses assignment of jobs in consideration of physical limitations. (See Defendant's motion, Exhibit 4). Provisions for layoff, reduction in force and subsequent seniority rights are set forth in the body of the CBA, Sections 58-66 (see Defendant's motion, Exhibit 3). Because plaintiff's discrimination claim arises out of subject matter included in the CBA and supplements thereto, it is preempted by federal labor law.

Similarly, plaintiff's retaliatory discharge claim is preempted as it is also "inextricably intertwined" with the provisions of the CBA governing discharge and appeal from discharge (see Defendant's motion, Exhibit 2). See *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985), *Stephens* and *Butynski, supra.*

In sum, this court finds that plaintiff's remaining claims are subject to the collective bargaining agreement between his union and his employer, and are, therefore, preempted by the Labor Relations Act, 29 U.S.C. § 1985. Accordingly,

IT IS ORDERED that defendant's motion for summary judgment is granted.

(s) BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: March 10, 1987

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RALPH FLEMING,
Plaintiff,

v.

CHRYSLER CORPORATION, a Delaware corporation
LOUIS EBALDI and LYNDON VERLYNDON, Jointly and Severally,
Defendants.

CASE NO. 85-CV-73803-DT
HON. BARBARA K. HACKETT

JUDGMENT OF DISMISSAL

The court, having reviewed and considered defendant's motion for summary judgment and plaintiff's response thereto, has granted defendant's motion in a memorandum opinion and order entered on this date.

Accordingly, this court orders the entry of a judgment of dismissal as required by F.R.Civ.P. 58. Therefore a judgment of dismissal is hereby entered in this case.

(s) BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: March 10, 1987

Appendix F

RULE 28.1 STATEMENT

The following is a listing of subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner Chrysler Corporation:

SUBSIDIARIES:

Chrysler de Mexico S.A.
Aire y Temperatura S.A.
Jeep Africa, Ltd.
Chrysler Comercial, S.A. de C.V.
Chrysler Life Insurance Company of Canada

AFFILIATES:

Arab American Vehicles Company
Automation Technologies Products
Beijing Jeep Corpration, Ltd.
CFC/GECC (New York) Associates II
Chrysler Japan Sales Limited
CSM & Co.
Diamond-Star Motors Corporation
Eagle Associates
Ensambladora Carabobo, C.A.
F.F. Developments Limited
Genigraphics Corporation
Highland Park Development Corporation
Mahindra & Mahindra, Ltd.
Manufacturers Hanover Asia, Limited
Mitsubishi Motors Corporation
Officine Alfieri Maserti S.p.A.
Onset Bidco, Inc.
Pinnacle Partners
Rambler Motors (AMC) Limited
Star Group IE Geothermal Partners
Star Group Stillwater Geothermal Partners
Synektron Corporation
Trico Marine Operators, Inc.
Valeo/Acustar Thermal Systems, Inc.